CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 705

ROBERT DAVID KERCHEVAL, OTHERWISE CALLED "BOB" KERCHEVAL, OTHERWISE CALLED "DAVE" KERCHEVAL, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 26, 1926

CERTIORARI GRANTED NOVEMBER 29, 1926

(32,272)

(32,272)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 705

ROBERT DAVID KERCHEVAL, OTHERWISE CALLED "BOB" KERCHEVAL, OTHERWISE CALLED "DAVE" KERCHEVAL, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 21, 1926

[fols. a-c]

IN UNITED STATES DISTRICT COURT, WESTERN ARKANSAS

WRIT OF ERROR—Filed April 27, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Arkansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the November Term, 1924, thereof, between The United States of America, Plaintiff, and Robert David Kercheval, defendant, a manifest error hath happened, to the great damage of the said Robert David Kercheval as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said records and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 25th day of June, 1925, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States this 27th day of April, in the year of our Lord one thousand nine hundred and twenty-five.

Issued at office in the City of Texarkana, Arkansas, with the seal of the District Court of the United States for the Western District of Arkansas, and dated as aforesaid.

Wm. S. Wellshear, Clerk District Court United States Western District of Arkansas. (Seal of the District Court, U. S. A., Western District of Arkansas.)

Allowed by Frank A. Youmans, Judge.

[File endorsement omitted.]

[fol. 1] IN UNITED STATES DISTRICT COURT

No. 1901

THE UNITED STATES OF AMERICA

v.

ROBERT DAVID KERCHEVAL, Otherwise Called "Bob" Kercheval, Otherwise Called "Dave" Kercheval

INDICTMENT—Filed December 12, 1923

THE UNITED STATES OF AMERICA,
Western District of Arkansas,
Texarkana Division, ss:

At a regular term of the United States District Court for the Western District of Arkansas, begun and holden on the 12th day of November, A. D. 1923, within and for the Texarkana Division of the Western District of Arkansas, at Texarkana, Arkansas, the Grand Jurors for the United States, selected, tried, empaneled, sworn and charged to inquire into, and true presentment make of all offenses under the laws of the United States committed within said district, upon their oaths present in open court and charge:

That heretofore, and prior to the several acts of using the United States Mails hereinafter set forth, one Robert David Kercheval, otherwise called "Bob" Kercheval, otherwise called "Dave" Kercheval, hereinafter in this indict-

ment called defendant, had devised and intended to devise a scheme to obtain money and property by means of false and fraudulent pretenses, representations and promises from numerous and sundry persons, too numerous to mention herein, and including the public generally, and including those whom, by the means hereinafter described, were induced to give, send and pay their money and property to the said defendant for what is hereinafter styled: Shares or Mineral Deeds of the Poindexter Royalty Syndicate and Smackover Jack Pot Syndicate (all of said persons being hereinafter referred to as the person to be defrauded), the said scheme being in substance and effect as follows, to-wit:

That the said defendant would organize and promote two certain oil stock promotion companies and sell shares or mineral deeds thereof, and dominate and control said companies and trust estates regardless of the interest of [fol. 2] the shareholders, said companies being as follows, to-wit:

Poindexter Royalty Syndicate with an authorized capitalization of $300,000 divided into 10,000 units or mineral deed assignments of the par value of $30.00 each with "Dave" Kercheval as sole trustee; Smackover Jack Pot, with authorized capitalization of $5,000,000 divided into 100,000 units or assignments of interest of the par value of $50.00 each, with "Bob" Kercheval, as sole trustee;

Both of said syndicates and trust estates would and did have their principal offices and places of business at Camden, Ouachita County, Arkansas, and would be and were dominated and controlled by the said defendant, with the pretended purpose of selling and dealing in oil royalties and mineral deed assignments, and in the oil business in general, for profit, but in truth and in fact for the purpose of selling shares or assignments of interest in both of said syndicates, to-wit: Poindexter Royalty Syndicate and the Smackover Jack Pot, and to appropriate and convert to his own use and benefit, large sums of money and property which would be and were received in payment therefor.

It was further a part of the said scheme and to more effectually carry said scheme into effect, the said defendant, would organize a so-called and pretended brokerage company, to-wit: American Finance Corporation, and would

largely own, dominate and control said alleged and pretended brokerage company and would and did use the same as an organ and agency and as a mouthpiece in sending out market letters and stock quotations, quoting fictitious prices on said shares or mineral deeds in said two enterprises, and boosting the said two enterprises of the said defendant and which would and did further aid and assist the said defendant in furtherance of his said unlawful and fraudulent scheme.

It was further a part of said scheme that the said defendant would and did represent, advertise and pretend that he, the said defendant, would declare a 50% cash dividend which, would be paid at a future date, to all holders of shares or assignment of interest in said two syndicates, whereas in truth and in fact, as the said defendant, then and there well knew that there was no income from said syndicate, or either of them, from which said alleged and pretended cash dividend could be and would be paid, but in truth and in fact, as the Grand Jurors charge the facts to be, said alleged and pretended cash dividend was only promised and held forth as an inducement, allurement and bait for said persons to be defrauded to make other and further investments in said unlawful and fraudulent scheme and to pay over their money and property to the said defendant without receiving anything of adequate value in return therefor.

It was further a part of said scheme that the said de- [fol. 3] fendant should appropriate and convert to his own use and benefit in the form and under the guise of salary, drawing accounts, expenses and commissions, a part of the money and property which would be and was paid for the purchase price of said shares or assignments of interest in said syndicates, but the exact manner and means by which said defendant intended thus to convert and appropriate to his own use and benefit such part of said money and property and the exact amount thereof that said defendant intended to and did thus appropriate and convert, is to the Grand Jurors unknown.

It was further a part of said scheme that the said defendant would make false and fraudulent pretenses, representations and promises to said persons to be defrauded through and by means of divers printed circulars, newspaper adver-

tisements, letters and publications and directly and through agents, all of which said matter would be and was sent to said persons to be defrauded, for the purpose of inciting and inducing said persons to be defrauded to purchase said shares or mineral deeds in said syndicates and to pay over their money and property for same, under his own name, and to said Poindexter Royalty Syndicate, Smackover Jack Pot and American Finance Corporation, respectively, in order that he, the said defendant, might fraudulently appropriate and convert large portions thereof, to his own use and benefit.

And the said defendant planned and schemed, that for the purpose of so inciting and inducing said persons to be defrauded, to deliver to him, the said defendant, their money and property he, the said defendant, would make false and fraudulent pretenses, representations and promises, in substance and in effect as follows, to-wit:

(1) To the effect that it was not the same old story an organization here today and gone tomorrow; that Jack Pot was not in that class, but that it was an organization built on principle that would carry forward and grow to larger successes year after year; that said company was organized so that it could take advantage of changing conditions as they should come in the oil industry; when in truth and in fact as the said defendant then and there well knew that the said Jack Pot Syndicate was only a fly-by-night concern and that it was not an organization built on principle which would carry forward and grow to larger successes year after year and that it was not true that said company was so organized that it could take advantage of the changing conditions that should come in the oil industry;

(2) To the effect that said Jack Pot Company was not a haphazard organization, but that its lines reached out; that the said defendant went into oil fields anywhere and bought, that his said stockholders were not gambling their all on the outcome of the drilling of one well; that Jack Pot in-
[fol. 4] vestments would cover the field; that the said defendant needed capital to invest in cheap oil; that if said persons to be defrauded bought Jack Pot Shares they would

be in the big whack-up that would come from the said defendant's sales within the next 90 days to 6 months; when in truth and in fact as the said defendant then and there well knew that said Jack Pot was only a haphazard organization and was only a stock selling promotion scheme of the said defendant and that it was not true that said persons to be defrauded had or would have an opportunity to be in on the big whack-up or any kind of whack-up within 90 days to 6 months or at any other time, other than paying over their money and property to the said defendant, who would and did thus appropriate and convert the same to his own use and benefit;

(3) To the effect that Jack Pot shares were $50.00 each, par value, but that he, the said defendant, was making a special offering of four $50.00 shares for $50.00, eight $50.00 shares for $100.00 and sixteen $50.00 shares for $200.00, that the reason said offer was made was because the said defendant could buy production at a tremendous discount and that it was necessary to get quick money or the opportunity would be gone; when in truth and in fact as the said defendant then and there well knew that said alleged and pretended special offer of shares in said syndicate for less than par value was only made as a further inducement to said persons to be defrauded to pay over their money and property to said defendant who would and did thus appropriate and convert the same to his own use and benefit;

(4) To the effect that Jack Pot was a fair, square proposition and defendant could see no reason why every investor would not reap a big harvest; that defendant was in the position of the farmer who had the wheat but who needed the hands to harvest; that the defendant needed hands to help harvest the crop of oil dollars he was sure to make; when in truth and in fact as the said defendant then and there well knew that the said Jack Pot Company was not a fair, square, proposition and there was no reasonable prospect that said investor (being of the persons to be defrauded) would reap a big harvest or any kind of harvest of profits out of said company, and the pretended harvest of oil dollars was only a lure and a bait to further induce said persons to be defrauded to part with their money and

property by investing in the said unlawful and fraudulent scheme of said defendant;

(5) To the effect that big money interest could spread propaganda to hide behind; that the big companies did not want the oil promoter, because they detested competition; that for said persons to be defrauded to listen to reason and not be carried off their feet by the saintly air of the big oil companies making said persons to be defrauded [fol. 5] believe that all oil promoters were crooks; that those same big boys were once promoters, that if said persons to be defrauded wanted to put their dollars to work where they could earn something they should buy Jack Pot interest; when in truth and in fact as the said defendant then and there well knew that each and every of said pretenses, promises and representation made were false and untrue and made with the intent and purpose of further inducing and inciting said persons to be defrauded to make other and further unprofitable investments in said syndicate and to pay over their money and property to said defendant;

(6) To the effect that the Smackover Jack Pot ante was $10.00; that the sky was the limit and there was no rake-off; that for said persons to be defrauded to put their ante in the mail and they would be issued for each ten spot a $50.00 Smackover Jack Pot Certificate; when in truth and in fact as the said defendant then and there well knew that it was not true that there was no rake-off by the said defendant out of the money and property paid over to him by the said persons to be defrauded, but that large portions thereof was appropriated and converted to defendant's own use and benefit;

(7) To the effect that the Capital Syndicate, a brokerage company, of Denver, Colorado, had underwritten the issue of stock of the said defendant and that they, the said Capital Syndicate, would offer for public subscription Jack Pot Certificates at par $50.00 each, that said securities would now be traded in throughout the U. S. A. and Canada and would be nationally advertised; when in truth and in fact as the said defendant then and there well knew that it was not true that the Capital Syndicate of Denver, Colo-

rado, had underwritten the issue of stock of the said defendant, but that said syndicate had purchased a small block at greatly reduced prices, and that said Jack Pot stock had no reasonable prospect of being bought and sold on the market of the United States;

(8) To the effect that said persons to be defrauded may not have been lucky to be in on the 50% whack-up for April, 1923, but that they, the said persons to be defrauded, could secure a "hand" and come in for the big "divey" which defendants expected to make in May; when in truth and in fact as the said defendant then and there well knew that it was not true that the defendant had paid a 50% whack-up in April, but in truth and in fact a fake stock dividend of 50% was declared; that there were no earnings from the said syndicate to cause a stock dividend of 50% or any dividend whatsoever to be declared and that said so-called dividend was declared and issue as a "hurry-up" and "come on" proposition to further incite and induce said persons to be defrauded to pay over other and further [fol. 6] sums of money and property to the said defendant;

(9) To the effect that through the various investigations of the United States Government with reference to the operations of a great many of the small promoters in the oil industry and that tremendous publicity had been given to all that by the Metropolitan Newspapers and that it was a well known fact that the large oil operators have profited by said investigations, by reducing the price of oil; when in truth and in fact as the said defendant then and there well knew and intended that said statements and representations were false and untrue and made and uttered with the intent and purpose of further misleading and deceiving the persons to be defrauded, by inducing and inciting them to pay over other and further sums of money to said defendant;

(10) To the effect that prosecution was not spelled the same as persecution; that said defendant would not say which word the great U. S. A. was now using; that defendant was entitled to his own opinion, even though it might be dangerous to express it; that the war with Germany was over, but that other wars seemed to be on; when in

truth and in fact as the said defendant then and there well knew that said statements and representations made, both directly and by innuendo, that the Government of the United States was not treating the oil promoters fairly by reason of its investigation of them, were false and untrue and made for the purpose of attempting to cover up and conceal his, defendant's, own fraudulent scheme and operations and to further deceive and defraud the said persons to be defrauded;

(11) To the effect that the Smackover Jack Pot had made a deal and had made a clear profit of $13,000 and that the said company would pay to all its stockholders of record on April 10, 1923, a 50% dividend, and that it would be a good idea for said persons to be defrauded to shoot a few tens in Smackover Jack Pot; when in truth and in fact as the said defendant then and there well knew that it was not true that the Smackover Jack Pot made a clear profit of $13,000.00 on an alleged deal, or any other sum or amount, and that said promise of a dividend of 50% was only another of the means to further incite and induce the said persons to be defrauded to make other and further unprofitable investments in said syndicate and pay over their money and property for same to said defendant;

(12) To the effect that when said persons to be defrauded bought Poindexter Royalty Syndicate Mineral Deeds that they would become the permanent owners and were buying something that was worth every cent they were asked to pay for same; when in truth and in fact as the said defendant then and there well knew that it was not true that said interests in the Poindexter Royalty Syndicate were worth every cent asked for them, but in truth and in fact [fol. 7] said interest were practically worthless and of little or no value whatsoever to the purchasers of the same, being of the persons to be defrauded;

(13) To the effect that the "Jimmy" Cox well located in Section 30—less than one-half mile from the Poindexter Royalty holdings—was making considerable gas and some oil; that the best informed men in the field were of the opinion that the Cox well would be one of the "gusher" type

well in the Smackover field and that it would be a big boost to royalty in that section; that there was no question but what Poindexter Warranty Royalty Deeds were an exceptionally good investment and that said persons to be defrauded should purchase them to the limit of their ability; when in truth and in fact as the said defendant then and there well knew that the so-called "Jimmy" Cox well was not an oil well or a producer of oil in commercial quantities but that the same was what is commonly called a salt-water well, all of which the said defendant well knew at the time of making said statements;

And the Grand Jurors further say, present and find that each and every of the pretenses, representations and promises made and planned to be made by said defendant, were false and untrue and at all the times mentioned herein were known by the defendant to be false and untrue, and to be made by the said defendant with the purpose and intent of inducing the said persons to be defrauded, to pay to him, the said defendant, large sums of money and property for shares or mineral deed interests of the said companies and syndicates and which said shares or mineral deed interests in said syndicates were then and there of much less value than the persons to be defrauded were to pay for the same; all of which the said defendant then and there well knew;

And the said defendant so having devised and intending to devise the aforesaid scheme did on the 1st day of February, 1923, at Camden, Arkansas, in the Texarkana Division of the Western District of Arkansas, and within the jurisdiction of this court, for the purpose of executing said scheme and attempting so to do, wilfully, unlawfully, knowingly, fraudulently and feloniously place and cause to be placed in a postoffice of the United States, to-wit: the postoffice at Camden aforesaid, to be sent and delivered by the postoffice esablishment of the United States to the addressee thereof, a certain letter, enclosed in a postpaid envelope, and adressed to Frank Glenn, 3531 Van Buren St., Chicago, Ill., said letter being of the tenor following, to-wit:

Poindexter Royalty Syndicate, Camden, Arkansas

Feb. 2, 1923.

[fol. 8] Mr. Frank Glenn, Chicago, Ill.

Dear Sir: Several days ago we sent you a letter regarding Poindexter Warranty Mineral Deeds.

It may be that you did not receive this letter, or that you have misplaced it, or again it may be that you do not fully realize what we are offering you.

We own a 1/32 interest in the Royalty on 500 acres in the Famous Smackover Oil Field, and the lease on this 500 acres is owned by the Standard Oil Company of La., and this company is to begin drilling on this acreage in 120 days from November 24, 1922, and in fact they have already made their location for their first well, and will very probably be drilling much earlier than they are required to do by contract.

It is possible that you do not understand that every dollar of expense that it takes to drill these wells and every dollar of expense that is required to market the oil is paid by the Standard Oil Company and our Royalty holders get 1/32 of all the oil that is ever produced from this vast tract.

Now listen this Royalty has been divided into 1,000 parts and that is what we are offering you. For the sum of $100 we will issue you 4/1000 of this royalty. Your name will be placed on record and as Oil is Marketed by the Standard Oil Company, they send you a check each month for your interest.

Here is what we did. We bought this Royalty and a lot of things have happened since. A lot of oil wells are now in and the Standard Oil Company is going to drill on this acreage and we are offering you a part of what we bought. You are not gambling half as much as we did. We had to buy it all to get any and now we are allowing you to come in for a few dollars, and share the profits with us. Are we selling You at the same Price We Paid? No. Because it is worth far more now than it was then, But We Are Selling at a price that is going to make you a lot of money or we miss our guess and the Standard Oil Company also misses their guess and the best evidence that they are pretty sure to be right is the Millions they have made.

You may not know it, but it is a fact a lot of Big Dividends have already been paid down here and a lot more are going to be paid and it was only a few days ago that Pat Marr mailed out to almost 5,000 people 100% Cash Dividend. Well about 140 days ago he was writing to a lot of people telling them he wanted them to buy in with him. A Lot of These Folks said No. "Don't think we are suckers." Well listen—there were about 5,000 suckers who sent him money. Now he has just finished sending those 5,000 suckers 100% dividend in cash. Now who was the sucker? [fol. 9] The fellow who Bought or the fellow who did not? Just answer this question. Don't you think it will pay to be fair with yourself?

Now Pat Marr is not the only fellow who has made a lot of people happy out of Smackover Oil.

Bob Chew, Paul Vitek and Vidler Royalties, have also made their Sucker investors happy. Each of these three companies and many more have mailed to every Man, Woman and Child that had an interest with them 100% and more in Cash Dividend.

Those people are going to get a lot more Dividends and a lot of other companies down here are going to make a lot of people happy.

The Oil Business is Just Like Any Other Business. If you Hit—You Make Money. If You Miss. You Lose, The Only Difference Is—When You Hit In the Oil Business, You Hit Bigger than you hit in most any other. Royalties offer the safest side of the oil business.

When you buy a Royalty Mineral Deed, you become the permanent owner and you are buying something that is worth every cent we are asking you to pay.

Many wells in the Smackover Field are producing from 10,000 to 25,000 barrels of oil daily.

Twenty five thousand barrels of daily production on the lease on which Poindexter Royalty holds their interest would mean but one thing. One Hundred Percent Dividend Per month. Understand we don't guarantee you 100% but we do say this is possible. I am sure you will agree with me that for $100.00 you cannot go out and buy an oil, well, but when a Lot of folks put in a $100.00 then you have a pot of money and you can do things. When we purchased this Royalty we believed that there were at least 250 people that

would like to join us for $100.00 each, but we did not have time to write all you folks and find out, so we layed out the cash and now we are writing you and telling you what it is all about.

It is a fair square proposition and the first 250 people who send us $100.00 are going to be mighty glad they did.

The only way to make Money is to make it work for you and we are offering you this opportunity. Poindexter Warranty Mineral Deeds. Price—4 Deeds $100.00 or 1 Deed $30.00. What are you buying? You are buying 1/1000 of 1/32 Royalty interest in every Barrel Of Oil that may ever be produced from this entire 500 acres of land, down here in Arkansas in the great Smackover Oil Field and the Standard Oil Company are going to do the drilling and they are going to spend all the money and when they get the oil the [fol. 10] Standard Oil Company will mail you your check each and every month, just as long as you continue to hold your interest.

Now if you want to make a Lot of Money by investing $100.00 just sign the enclosed application blank and shoot it along with your check pinned to it and if we still have the Warranty Deeds, we will keep your check and send you the Warranty Deeds. If they are all gone we will return your check.

It might be a good thing to wire your application and let check follow.

Here is hoping we will make a lot of money and that you won't misplace this letter and keep us waiting for your check until we have sold all the Deeds.

Yours for the 100% dividends, Poindexter Royalty Syndicate, by Dave Kercheval.

P. S.—Say you don't know who we are so it might be better for you to just send your check to the Ouachita Valley Bank here and tell them when we deliver so many deeds to them that they are to give us your check.

Make check payable to Poindexter Royalty Syndicate.

That at the time of the placing and the causing to be placed said letter in the postoffice of the United States as aforesaid, the defendant then and there well knew that said letter was for the purpose of executing said scheme; con-

trary to the form of statutes in such cases made and provided and against the peace and dignity of the United States of America.

Second Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that said defendant, on May 1, 1923, at Camden aforesaid, in said division and district aforesaid, so having devised the scheme for obtaining money and property by means of false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are incorporated by reference thereto, in this count, as fully as if they were here repeated, for the purpose of executing said scheme, and attempting so to do, unlawfully, wilfully, knowingly and feloniously, did place and cause to be placed a certain letter in the postoffice of the United States at Camden aforesaid, there to be sent and delivered by the postoffice establishment of the United States to another of said persons to be defrauded, that is to say, a letter enclosed in a postpaid envelope and addressed to Mr. Wm. D. O'Connell, 705 Charleston Street, Mobile, Alabama, said letter being of the tenor following, to-wit:

[fol. 11] American Finance Corporation, Brown Building, Camden, Arkansas

Leases, Royalties, Production, Deeds, Bonds, Stocks

April 30, 1923.

Mr. Wm. D. O'Connell, 705 Charleston Street, Mobile, Alabama.

Dear Mr. O'Connell: We have your favor of the 28th inst., in reply to ours of the 25th inst.

Our Mr. Kercheval, President of the Company, is in Kansas City and Denver on business and just as soon as he returns to sign the voucher, we will forward you your money as per your letter.

We wish to call your attention to Smackover Jack Pot which is selling at $10.00 for a fully paid up $50.00 interest. All stockholders on record of April 10th will receive

a 50% cash dividend, and they expect to pay another big dividend in May.

We are advised by the Trustee that he expects to advance the price of these Certificates May 16th, and in our opinion if you want to make a buy that will pay you real money you cannot make a mistake in taking a block of these Certificates.

For your convenience we herewith attach application blank which you can send direct to us, and we will be pleased to execute your order for whatever amount of these Certificates you desire.

Everything points now that Smackover Jack Pot will be able to pay a good many dividends before the year has closed.

Awaiting your advice, we are,

Yours very truly, American Finance Corp. C. E. Martin, Vice-Pres.

M:PD.

that at the time of the placing and the causing to be placed said letter in the postoffice of the United States as aforesaid, the defendant then and there well knew that said letter was for the purpose of executing said scheme: Contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

Third Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that said defendant on June 16, [fol. 12] 1923, at Camden aforesaid, in said division and district aforesaid, so having devised the scheme for obtaining money and property by means of false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are incorporated by reference thereto, in this count, as fully as if they were here repeated, for the purpose of executing said scheme, and attempting so to do, unlawfully, wilfully, knowingly and feloniously, did place and cause to be placed a certain postpaid envelope in the postoffice of the United States at Camden aforesaid, and which said envelope had enclosed therein three circular

letters, together with application blank and self addressed envelope and which said circular letters were to be sent and delivered by the postoffice establishment of the United States to another of said persons to be defrauded, that is to say, said circular letters being enclosed in an envelope and addressed to Frank Glenn, 3609 S. Pakley Av., Chicago, Ill., said letter being of the tenor following, to-wit:

Smackover Jack Pot, Camden, Arkansas, Where They All Meet on Equal Terms

Smackover Jack's Table

$ $ $
$ Big Pot $
$ $ $

No Kitty in the Middle

Have a Seat

Dear Sir: It is not the same old story. An organization here today and gone tomorrow. Most of us have learned such stories at the expense of hard earned "Dollars."

Jack Pot is not in that class, but is an organization built on a principal that will carry forward and grow to larger successes year after year.

This company is so organized that it can take advantage of changing conditions as they come in the oil industry.

Today we find Crude Oil a drug on the Market selling far below its real value. Many small companies are being forced to sacrifice to the Big Boys who have the money, by buying at their own price, They make Money earn money.

Jack Pot is preparing to enrich its stockholders by following the same plan. Buy production today for a song. Hold it for the next ninety days to six months, then sell. What does it mean? Production we buy today for $10,000.00 will no doubt sell in the early fall for $30,000.00 to $50,000. From this Sure profit, our stockholders will no doubt receive 300 to 500 per cent. This is the safe way to play the oil game.

[fol. 13] This is not a haphazard organization, but our lines reach out. We go into Oil fields anywhere and buy.

You as a stockholder are not gambling your All on the outcome of the Drilling of one Well.

Jack Pot investments will cover the field. Few have ever seen a time when a Dollar will go as far in the oil game, as it will now. We need Capital to invest in Cheap Oil. If you buy Jack Pot Shares, you are going to be in on the big Whack up that will come from our sales in the next ninety days to six months.

Here is an investment opportunity that should appeal to men and women of reason. You cannot possibly go single handed and alone with a $100.00 and properly invest it in the Oil Game, but you and 999 more people can form a Pot of $100.00 each and then with The $100,000.00 get into the game.

We invite you to come in the Oil game with $100.00 more or less. We can buy valuable production by paying part cash and balance monthly. You can buy in the Jack Pot on the same plan.

Smackover Jack Pot. Shares par value $50.00 each. Special Offering. Four $50.00 Shares for $50.00. Eight $50.00 Shares for $100.00. Sixteen $50.00 Shares for $200. Why do we make this special offer? Because we can buy production today for a tremendous discount and it is necessary that we have the money quick or else the opportunity will be gone.

No subscription accepted for less than four shares, or more than sixteen at the discount price. For your convenience, we have arranged a plan whereby you can mail 20 per cent with your order and balance payable in four equal monthly payments. Should you buy four shares, send $10.00 with order. Should you buy sixteen send $40.00 with order. On receipt of initial payment your stock will be made out in your name and placed in your file and you will be credited with the dividends on full amount of shares purchased.

The above plan is offered you because we can arrange our purchases on same lines.

Here is a fair square proposition and we can see no reason why every investor will not reap a big harvest.

We are in the position of the farmer who has the wheat but needs the hands to harvest.

We invite you to help us harvest the crop of oil dollars that is ripe and ready for the reaper. Will you do your part?

Use the application blank, mark your decision, place in addressed envelope. Act today.

[fol. 14] Assuring you we are out to make big returns for our stockholders, and that you will be given a square deal, we are,

Sincerely, Smackover Jack Pot. Bob Kercheval, Dealer.

BK-CR.

Help. Read Facts Help.

Let's Take the Mask Off and See What it Hides

Within the past few months a number of Oil Operators have been indicted for using the mails fraudulently.

You may be a stockholder in some of these Companies. Frankly, has your stock increased in value since these men have been indicted? No, it has not, but instead, most of these Companies' Stocks have gone a great deal lower.

Of course, the many operators who have been indicted are up against it to raise capital to go forward with their operating campaigns. As a Stockholder you have been hurt. Has anybody or Company found themselves in a better position since these indictments? Yes, Big Companies who had surplus money have been able to buy leases and production at their own price. Competition from the small operator has been eliminated.

Your opportunity to make back some of your losses, or maybe all, is presented to you now.

Smackover Jack Pot asks you to send in cash so that we may go out and buy a part of this cheap production.

All we have to do is buy now, hold on until the Big Companies get ready to put the price of oil up again. Then we will sell for a profit. You will make money by investing now.

The Big Companies don't want you to invest your money with the small operator for they don't want competition. They don't want the boys who risk their all in this game. They don't want to pay big prices for leases. They want you to think the Promoter is a crook. They want you to

put our money in the Savings Bank. They can go to the bank and borrow your money and use it to put the little fellow out of the game.

Don't you think it is about time for the man of small means to have some say?

If you join Smackover Pot today you will be helping yourself and at the same time making it possible for the small operator to stay in the game.

We are not quitters and we need your help now. That [fol. 15] is why we make you the special offer as contained in enclosed circular.

Will you help?

Yours truly, Smackover Jack Pot, by Bob Kercheval, Dealer.

Read—Think—Act

Whenever Big Money interests can spread propaganda to hide behind, it makes their task of crushing the Small Man Easy

We have Railroads, Automobiles, Flying Machines, Electric Street Railways, Steamship lines, and many other important industries. Who made these things possible? The despised promoter.

The big Oil Companies don't want the Oil Promoter—why? Because they detest competition. Do you ever lose money when you buy the Big Boy's Stock on Wall Street? Yes. Why not put up a yell and have them indicted?

Now listen to reason, don't be carried off your feet by the Saintly air of the Big Oil Companies. Don't let them make you believe that all Oil Promoters are Crooks. These same Big Boys were once Promoters.

What are you going to do? Let the big interests monopolize the Oil Industry? That's what they would have you do. Well, let me tell you something; if you don't help the little fellow, it won't be long until Mr. Big Oil Man will pay what he pleases for Leases and Production, and he will charge you what he pleases for the gas you use in the flivver. Between Mr. Flivver Maker, and Mr. Big Oil Boss, they have sewed up the money of this country already.

When you go in your bank they take your money and if you want to invest it they attempt to tell you what's

good for you to buy. There never will be a better time to make money in the Oil Game than now.

I cannot buy production unless I have money, and all I can do is appeal to the American Public's good common sense. If you will send me money I am going to invest it in the Oil Game down here and you are going to get a square deal and if I don't make a bunch for us all I will miss my guess.

If you want to put your dollars to work where they can earn something for you—buy Jack Pot today.

Yours respectfully, Smackover Jack Pot, by Bob Kercheval, Dealer.

That at the time of the placing and causing to be placed said circular letters in the post office of the United States as aforesaid, the defendant then and there well knew that [fol. 16] said letters were for the purpose of executing said scheme; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

Fourth Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that said defendant, on April 21, 1923, at Camden aforesaid, in said division and district aforesaid, so having devised the scheme for obtaining money and property by means of false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are incorporated by reference thereto, in this count, as fully as if they were here repeated, for the purpose of executing said scheme, and attempting so to do, unlawfully, wilfully, knowingly and feloniously, did place and cause to be placed a certain letter in the post office of the United States at Camden aforesaid, together with a certificate of interest of the Jack Pot Syndicate and also application blanks for further subscriptions in said syndicate, the same being enclosed together with said letter, there to be sent and delivered by the post office establishment of the United States to another of said persons to be defrauded, that is to say, said letter together with enclosures

being enclosed in a postpaid envelope and addressed to Mr. Charles Billina, 1503 Poplar Street, Denver, Colorado, said letter being of the tenor following, to-wit:

50 for 10. Have a Seat

Smackover Jack Pot

April 20, 1923.

Mr. Charles Billina, 1503 Poplar Street, Denver, Colorado.

DEAR MR. BILLINA: Enclosed find certificate for one $50.00 interest in Smackover Jack Pot as covered by your Post Office Money Order. You got in under the wire. This means that for every Ten Spot invested by you, there will be a Five Spot handed back out of the first whack up.

The dealer has another proposition on, which is practically consummated and if it goes through we will be able to make another whack up some time in May, and we anticipate that it will be at least a 50% dividend. This will hand back to all players who are in at that time their original investment and they will be sitting in the game [fol. 17] with a Royal Flush. So use the wire immediately if you want the dividend check to be a big one.

Yours for big play, Smackover Jack Pot. Bob Kercheval, Dealer.

BK:PD.

That at the time of the placing and causing to be placed said letter, with enclosures, in the post office of the United States as aforesaid, the defendant then and there well knew that said letter, and enclosures, were for the purpose of executing said scheme. Contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

Fifth Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that said defendant, on May 1, 1923, at Camden aforesaid, in said division and district aforesaid, so having devised the scheme for obtaining money

and property by means of false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are incorporated by reference thereto, in this count, as fully as if they were here repeated, for the purpose of executing said scheme, and attempting so to do, unlawfully, wilfully, knowingly and feloniously, did place and cause to be placed a certain letter in the post office of the United States at Camden aforesaid, together with application blank and a purported reprint from Mining and Financial Record, Denver, Colorado, May 19, 1923, the same being enclosed with said letter, there to be sent and delivered by the post office establishment of the United States to another of said persons to be defrauded, that is to say, said letter together, with enclosures, being addressed to Mr. J. W. Swanson, P. O. Box 172, Glenmore, La., said letter being of the tenor following, to-wit:

50 for 10. Have a Seat

Smackover Jack Pot, Camden, Arkansas

April 30, 1923.

Mr. J. W. Swanson, Glenmore, La.

DEAR SIR: We know you are interested in the opportunities offered in the Smackover field, or you would not have filled out the application in the Police Gazette.

We tried to give you such information that might enable you to decide to play a few hands with us in the great game and make a clean up with us.

[fol. 18] You were not lucky to get in on the 50% whack up for April, but you can secure a hand and come in for the big "div-y" we expect to make in May.

There are many opportunities offered every day to secure interest in drilling wells, and off-set acreage that will make big money for us. If you boys will shoot along the Ten Spots fast enough, we can pick up more of these bargains and make real money for the players.

We are enclosing application blanks for your convenience, and you can shoot along as many Tens as you desire. We will issue you a fully paid $50.00 Certificate for each $10.00 for a short time longer.

Trusting you will be fortunate enough to come in with us before the price of our Certificate is advanced, we are

Yours very truly, Smackover Jack Pot. Bob Kercheval, Dealer.

That at the time of the placing and the causing to be placed said letter, with enclosures, in the post office of the United States as aforesaid, the defendant then and there well knew that said letter, and enclosures, was for the purpose of executing said scheme. Contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

Sixth Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that said defendant, on February 26, 1923, at Camden aforesaid, in said division and district aforesaid, so having devised the scheme for obtaining money and property by means of false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are incorporated by reference thereto, in this count, as fully as if they were here repeated, for the purpose of executing said scheme, and attempting so to do, unlawfully, wilfully, knowingly and feloniously, did place and caused to be placed a certain letter in the post office of the United States at Camden aforesaid, together with partial payment application blanks, the same being enclosed with said letter, there to be sent and delivered by the post office of the United States to another of said persons to be defrauded, that is to say, said letter, together with enclosures, being addressed to Mr. M. G. Schultz, 53 W. 63rd St., Chicago, Ill., said letter being of the tenor following, to-wit:

[fol. 19] Poindexter Royalty Syndicate, Ouachita Valley Bank Building, Camden, Arkansas

Mr. M. G. Schultz, 53 W. 63rd St., Chicago, Ill.

February 26, 1923.

Dear Mr. Schultz: Received your subscription of Feb. 23rd on partial payment form together with your check for $70.00. We have given you credit for this amount on 8 Warranty Deeds as per contract and you may remit 35% of the total (which would be $200.00) each month until the total amount has been paid. We have issued the 8 Deeds in your name and deposited same in the Ouachita Valley Bank at this City and when total payments have been made Warranty Deeds will be forwarded to you.

There is no question in the writer's mind but that you have made an exceptional purchase for since writing you developments in and around the Royalty of which you are a part owner have been such as to enhance the value. For instance, the Cox well today is an absolute assured thing; same being located in Section 30, and the Hughes well came in on the 22nd of this month for about 26,000 barrels, same being in Section 28. Poindexter Royalty Deeds, in the writer's opinion, within the next ninety days will be worth four or five times the amount you have paid and we are justified in raising the price and shall do so on or about March 1st. We are writing each and every one of the present holders, including yourself, and notifying them of this fact and if you should desire to participate further in Warranty Royalty Deeds you may still do so at the old price of four Deeds for $100.00 either all in cash or on a partial payment plan but it will be necessary for you to wire your reservation as we only have a limited amount of deeds available at this time.

Poindexter Royalty is so good that should you wish to dispose of same within the next six months we will agree to redispose for you on basis of two to one or market price. That will show you our implicit faith in the outcome. With this statement on our part the writer is sure you should have no hesitance in going the limit in the purchasing of this Royalty even though it be necessary for you to bor-

row some 6% or 8% money, so kindly advise by wire your wishes.

Yours very truly, Poindexter Royalty Syndicate. Dave Kercheval, President.

That at the time of the placing and causing to be placed said letter, with enclosures, in the post office of the United [fol. 20] States as aforesaid, the defendant then and there well knew that said letter was for the purpose of executing said scheme. Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

H. M. Stevens, Foreman of Grand Jury. S. S. Langley, United States Attorney. Jas. D. Shaver, Special Assistant U. S. Attorney. H. L. Arterberry, Special Assistant U. S. Attorney.

[File endorsement omitted.]

[fol. 21] IN UNITED STATES DISTRICT COURT

ORDER RECITING WITHDRAWAL OF PLEA OF NOT GUILTY, ETC.—March 30, 1925

This day comes the United States of America by S. S. Langley, Attorney for the Western District of Arkansas, and by James D. Shaver, Special Assistant United States Attorney, and comes the defendant, Robert David Kercheval in his own proper person and by Jones & Jones, his attorneys, and by leave of court said defendant withdraws his plea of not guilty heretofore entered in this cause and files demurrer to the indictment herein. Said demurrer coming on to be heard and being argued by counsel and submitted, the court being well and sufficiently advised in the premises doth overrule the same. To the action of the court in overruling said demurrer said defendant duly excepted at the time. Thereupon said defendant in open court waives formal arraignment and says he is not guilty as charged in either of the counts of said indictment and puts himself upon the country.

[fols. 22-24] Whereupon the jury retires in charge of a duly sworn bailiff of the court.

(Trial Continued.)

Entered in U. S. District Court March 31, 1925. (Caption omitted).

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT AND SENTENCE—April 27, 1925

On Motion of S. S. Langley, Esq., Attorney for the Western District of Arkansas, the said defendant, Robert David Kercheval, was brought to the bar of the court, in custody of the marshal of the said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned by the jury on the first, third, fourth, fifth and sixth counts of the indictment in this cause on the third day of April, A. D. 1925, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said:

Whereupon, the premises being seen, and by the court well and sufficiently understood, it is by the court considered, ordered and adjudged that the said Robert David Kercheval for his offense as charged in the first count of the indictment be imprisoned in the United States Penitentiary situated at Leavenworth in the State of Kansas for the term and period of three years, and that he pay to the United States of America a fine of three hundred dollars; that the said Robert David Kercheval for his offense as charged in the third count of the indictment be imprisoned in said United States Penitentiary for the term and period of three years and that he pay to the United States of America a fine of three hundred dollars; that the said Robert David Kercheval for his offense as charged in the fourth count of the indictment be imprisoned in said United States Penitentiary for the term and period of three years and that he pay to the United States of America a fine of three hundred dollars; that the said Robert David Kercheval for his offense as charged in the fifth count of the indictment be imprisoned in said United States Penitentiary for the term and period of three years and that he pay to

the United States of America a fine of three hundred dollars; that the said Robert David Kercheval for his offense [fol. 26] as charged in the sixth count of the indictment be imprisoned in said United States Penitentiary for the term and period of three years and that he pay to the United States of America a fine of three hundred dollars.

It is by the court further considered and ordered that the terms of imprisonment herein adjudged on the third, fourth, fifth and sixth counts of the indictment shall run concurrently with the term of imprisonment herein adjudged on the first count of the indictment.

It is by the court further considered and ordered that execution may issue for the fines herein adjudged.

It is further considered, that the marshall of the Western District of Arkansas, in whose custody the said Robert David Kercheval is now here committed, receive and safely keep and convey the body of the said Robert David Kercheval hence to said United States Penitentiary without delay, and deliver him to the custody of the keeper of said penitentiary, who will receive and safely keep the said Robert David Kercheval in jail in execution of the sentence aforesaid, and in conformity with the same, for the full period of the time aforesaid.

And it is further ordered, that the clerk of this court furnish the marshal of this district with two duly certified copies of this judgment, sentence and order, under the seal of the court, one of which shall be delivered to the keeper of said penitentiary and the other returned by the marshal to this court, with a full and true account of the execution of the same.

[fol. 27] IN UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, TEXARKANA DIVISION

No. 1901

UNITED STATES OF AMERICA, Plaintiff.

vs.

ROBERT D. KERCHEVAL, Defendant

ASSIGNMENTS OF ERROR NOS. 4 AND 17—Filed April 27, 1925

Now comes Robert D. Kercheval, otherwise called "Bob" Kercheval, otherwise called "Dave" Kercheval, the defendant in the above styled cause, and who is the plaintiff in error, and in connection with his petition for writ of error says that in the record proceedings and judgment aforesaid, error has intervened to his prejudice, and files the following assignment of errors appearing upon the record in this cause which the defendant avers occurred upon the trial thereof and for which the judgment should be reversed, to-wit:

* * * * * * *

[fol. 28] 4.

The court erred in permitting Judge James D. Shaver, counsel for the Government, to state in his opening statement to the jury that defendant had entered his plea of guilty and then withdrawn it, and in refusing to reprimand counsel for making that remark in his opening statement.

[fols. 29-45] 17

The court erred in permitting the plaintiff, over the objection of the defendant made at the time, to introduce and read in evidence the Exhibit No. 44 which is a formal plea of guilty by defendant on charges in this indictment.

* * * * * * *

[fol. 46] In United States District Court

[Title omitted]

Bill of Exceptions—Filed July 21, 1925

Caption

Be it remembered that on the 30th day of March, 1925, [fols. 47-198] the above entitled cause came on for trial before the Honorable Frank A. Youmans, Judge, presiding, a good and lawful jury having been empaneled and sworn to try the issues joined, the United States being represented by its counsel S. S. Langley, United States District Attorney, and James D. Shaver, Special Assistant United States Attorney, and the defendant being represented by his counsel Jones & Jones, the following proceedings were had:

In the course of the opening statement by counsel for the Government, the defendant objected to the jury being told that he had once pleaded guilty to the charges contained in the indictment on which he was being tried, and said objection being overruled by the court, defendant duly saved his exception.

[fol. 199] Colloquy Between Court and Counsel

Mr. Shaver: We desire to introduce in evidence a certified copy of plea of guilty entered in this case by the defendant.

Mr. Jones: If Your Honor please, we object to the introduction of the paper, which is a formal plea of guilty by [fol. 200] the defendant on the charges in this indictment, because we say it is incompetent and prejudicial to the defendant.

The Court: Objection is overruled.

Mr. Jones: We except.

Said paper identified as Exhibit No. 44, being in words and figures as follows:

EXHIBIT NO. 44 IN EVIDENCE

Be it remembered that at a regular term of the District Court of the United States for the Western District of Arkansas, Texarkana Division, begun and held at the City of Texarkana, Arkansas, on the 12th day of May, 1924, that being the second Monday in said month and the day appointed by law for the beginning of said term:

Present and presiding, Honorable Frank A. Youmans, Judge.

On Monday May 24, 1924, among the proceedings had were the following, to-wit:

No. 1901

UNITED STATES

vs.

ROBERT DAVID KERCHEVAL

Indictment for Violation Section 215 Penal Code

This day comes the United States of America by S. S. Langley, Esq., Attorney for the Western District of Arkansas, and Jas. D. Shaver, Esq., and H. L. Arterberry, Esq., Special Assistant United States Attorneys, and comes the defendant Robert David Kercheval in custody of the marshal, and in open court the said defendant waives formal arraignment and says he is guilty as charged in each of the six counts of the indictment in this cause.

I, Wm. S. Wellshear, clerk of the District Court of the United States for the Western District of Arkansas, certify the foregoing to be a true and correct copy of the record of the plea entered on the 24th day of May, 1924, in the case of the United States vs. Robert David Kercheval, No. 1901, as the same appears in the record of said court in the Texarkana Division of said District.

In testimony whereof I hereunto set my hand and affix the seal of said court at office in the City of Texarkana, Arkansas, this March 30th, 1925.

Wm. S. Wellshear, Clerk. (Seal.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Shaver: We desire to offer in evidence as Exhibit 45 the judgment of the court on that plea of guilty.

Mr. Jones: We object, if Your Honor please, to the introduction of the certified copy of the judgment and sentence of the court because the same is incompetent, irrelevant and prejudicial to the defendant.

The Court: On what ground, Judge Shaver, do you contend that the judgment is competent?

[fols. 201-329] In the aspect that this case is in the plea of the defendant as made, I think is competent. That was something done by himself, but as is apparent, this particular judgment is the judgment of the court on the plea, and is not the act of the defendant. That was afterwards set aside, and as was stated, I think it is stated on both sides, the plea of guilty was withdrawn—he was permitted to do that and enter a plea of not guilty. I do not believe that the judgment is competent.

Mr. Shaver: Nothing further than to show that the plea was not attempted to be withdrawn until after judgment and sentence was pronounced. And then when it was set aside further we can show, and will show, if necessary, that after judgment a motion was filed by defendant not to set aside the plea of guilty. He did not ask for that in the motion, but admitted in the motion that the plea had been entered and asked for the sentence to be reduced. However, we will not offer this at this time.

The Court: It may become competent in the course of the proceedings, but up to this time I doubt if it is competent.

Government rests.

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

Mr. Jones: At the close of the Government's testimony the defendant requested the court to instruct the jury to find the defendant not guilty on each and every count of the indictment, which request for instruction the court refused to grant and denied the instruction, to which the defendant excepted.

[fols. 330-387] R. D. KERCHEVAL, the defendant in the case, being first duly sworn, testified in his own behalf as follows:

Direct examination by Mr. Jones:

[fol. 388] Q. They have read here in evidence a copy of the record of this court showing that you entered a plea of guilty to the charges made in this indictment. Now I want you to state to the jury what representations and promises were made to you, if any, that induced you to enter that plea of guilty?

A. I was offered three months in jail and a thousand dollar fine.

Q. Now state who made that offer, how the offer came to be made and where it was made, and what was done by you after the offer was made.

A. I met Mr. H. L. Arterberry, whom I understand was special assistant United States Attorney in this district. I met him on the evening of December 12, 1923, in a room on the lower floor of the Federal Building on the Texas side, and discussed my case with him following the indictment [fol. 389] that day. I asked him if he would allow me to enter a plea of guilty and take a small fine and have time to pay it in. I had no money. He said that would be impossible, but he proposed that if I would enter a guilty plea that he would recommend three months in jail and a $1,000 fine. Mr. Ira Ross came into the same room a little later and we discussed the matter further. Both Mr. Ross and Mr. Arterberry and myself. Mr. Ross acquiesced in the recommendation. Mr. Arterberry told me to consider the matter seriously and I told him I was. I told him nothing about what I would do. He told me to take my time

as I didn't have to plead before February 12, 1924. I left at that time. That was the recommendation that was proposed to be made and the conditions under which it was proposed.

Q. Go ahead. What did you do?

A. I went to New York City a short time thereafter and I was returned here into this court on May 24, 1924, returned to Texarkana in the custody of a United States Marshal and delivered to the Miller County jail. This being on Saturday morning and about 9 or 9:30 Saturday morning I was brought to this court room and I entered a plea of guilty before Judge Youmans and received sentence of three years on each count to run concurrently and a hundred dollar fine on each count on execution. I was then remanded back to the Miller County jail.

Q. After that sentence was imposed on you did you ask permission of the court to withdraw the sentence?

A. I did.

Q. I mean to withdraw the plea of guilty?

A. I did.

Mr. Jones: I offer in evidence the certified copy of the order of court entered the 12th day of May, 1924.

Said certified copy of order of the court being in words and figures as follows:

EXHIBIT No. 29

Be It Remembered That at a regular term of the District Court of the United States for the Western District of Arkansas, Tekarkana Division, begun and held at the City of Texarkana, Arkansas, on the 12th day of May, 1924, that being the second Monday in said month and the day appointed by law for the beginning of said terrm:

Present and presiding, Honorable Frank A. Youmans, Judge;

On Friday, June 6th, 1924, among the proceedings had were the following, to-wit:

[fol. 390]

No. 1901

UNITED STATES

v.

ROBERT DAVID KERCHEVAL

Indictment for Violation Section 215, Penal Code

This day comes the United States of America by S. S. Langley, Esq., Attorney for the Western District of Arkansas, and by Jas. D. Shaver, Esq., and H. L. Arterberry, Esq., Special Assistant United States Attorneys, and comes the defendant Robert David Kercheval in custody of the marshal and by Paul Jones, Esq., his attorney, and said defendant files motion to set aside the judgment and sentence of the court heretofore entered against him in the above entitled cause, and the United States by its said attorneys files response to said motion.

Said motion being heard and submitted, the court being well and sufficiently advised in the premises doth sustain the same and it is by the court ordered and adjudged that the judgment and sentence heretofore entered against the defendant Robert David Kercheval in this cause be and is hereby vacated, set aside and held for naught.

Thereupon the defendant Robert David Kercheval by leave of court withdraws his plea of guilty heretofore entered herein and now says he is not guilty as charged in either of the six counts of said indictment and puts himself upon the country.

It is by the court further considered and ordered that bail of the said defendant in this cause be and is hereby fixed at the sum of $10,000.00.

I, Wm. S. Wellshear, Clerk of the District Court of the United States for the Western District of Arkansas, certify the foregoing to be a true and correct copy of an order of said court in the cause therein entitled, as the same appears of record in my office as such clerk in the Texarkana Division of said District.

In Testimony Whereof I hereunto set my hand and affix the seal of said court at office in the City of Texarkana, Arkansas, this March 30, 1925.

Wm. S. Wellshear, Clerk. (Seal.)"

Q. Is the Arterberry named in here as one of the District Attorneys the same H. L. Arterberry with whom you made the agreement that you refer to?

A. Yes, sir.

Q. He was at that time in attendance upon the court here?

A. Yes, sir.

Q. Now where did you have that interview and receive that statement from Mr. Arterberry?

A. I was on the lower floor of the Federal Building on the Texas side.

Q. You say you were brought back to Texarkana by the United States Marshal from New York?

A. Yes, sir.

[fol. 391] Q. Had you gone to New York on business?

A. I had.

Q. You were due to appear in this court on the first day of the May term?

A. No, February 12, as I remember it.

Q. Did you appear?

A. I did not.

Q. Why didn't you appear?

A. I could not get there.

Q. Why?

A. Didn't have the finances and had been sick.

Q. You were sick and without finances. To what extent were you sick?

A. I had double pneumonia.

Q. Were you confined to your bed?

A. On February 12th, yes, I was confined to the house.

Q. You were convalescent then?

A. Yes, sir.

Q. How long had you prior to that time had this attack of double pneumonia?

A. About five weeks.

Q. During that five weeks, state whether you were able to attend to any business?

A. No, sir.

Q. And when the time came you were still confined to your house?

A. No, I was convalescent; I was around the place.

Q. Around the house you mean?

A. Yes, sir.

Q. But you were entirely without means to come to Texarkana?

A. I was.

Q. I will ask you if you at that time had on hand any deals that you expected to come through?

A. Yes, sir, I was working on some commission propositions.

Q. Did you have an office in New York?

A. Not on February 12th, but I had within a very short time thereafter, that is, I was working out of an office.

Q. You had room in an office?

A. Yes, sir.

Q. Where was the office located?

A. In the large court building on the eighth floor, Williams & Exchange place.

Q. State whether or not that is one of the principal office buildings in the City of New York?

A. It is, that is in the financial district.

Q. Exchange Place is right next to Wall?

A. Exchange Place is parallel.

Q. Williams parallels Broad and Williams Street crosses Wall Street at the City National Bank, the old Customs House?

A. Yes, sir, it does.

Q. Is there any more prominent spot in New York for office buildings than that block?

A. I would certainly say there was not.

Q. And you were doing business there at that place?

A. Yes, sir.

Q. Now did you confer with any attorney in New York with reference to your appearing in this court?

A. I did.

Q. Who was that attorney?

[fol. 392] A. I can't recall his name right now. Goodwin, 1482 Broadway.

Q. That is in Lower Borough?

A. No, that is on the corner of 42nd and Broadway.

Q. Now what advice or information did you receive with reference to your having to be here, from this attorney?

A. He told me that I could communicate with an attorney and have him appear for me for the setting of the case.

Q. Mr. Goodwin said that?

A. No, he said I could write and have an attorney.

Mr. Langley: I don't see the materiality of that.

The Court: Objection will be sustained.

Mr. Jones: Exception.

Q. I will ask you if on February 20, 1924, you wrote this letter to Mr. Keith at Texarkana, Arkansas, with reference to the setting of your case?

A. This is a telegram. I think this is the copy. Yes, sir, that is a copy of the telegram.

Q. That is a copy of the telegram that you sent to George Keith?

A. Yes, sir.

Mr. Shaver: There is no way of knowing whether this telegram ever reached Mr. Keith. I object to it because I don't know anything about it.

The Court: Objection will be sustained.

Q. I will ask you who is George Keith, or was George Keith?

A. One of the parties who was on my bond at that time

Q. He was one of the securities on your bond?

A. Yes, sir.

EXHIBIT No. 30

2/20/24.

George E. Keith, Texarkana, Arkansas:

Answering please secure attorney to appear for me and enter my plea not guilty stop sudden attack of pneumonia prevents my appearance at this time in person stop I wrote attorney to appear for me but received no response stop

attorney here advises that you can have attorney there enter my plea stop advise name of attorney and trial date so I may make arrangements to appear stop for I will come.

R. D. K."

Q. Did he live at Texarkana?

A. He lived at Camden.

Q. Why did you address him at Texarkana?

[fol. 393] A. Because he wired me from Texarkana that he was here.

Q. And on receiving his wire you sent him this telegram?

A. I did.

Q. Do you know whether Mr. Keith ever received this telegram?

A. I had service on it and it was not reported back to me.

Q. If he had not received it, under the rules of the company——

Mr. Langley: I object to it.

The Court: Objection sustained.

Mr. Jones: Exception.

The Court: Mr. Jones, I don't see it is material in any respect why he sent it. You have asked the question, you have gotten the matter in the record. You may have it identified if you will, so that you can have the benefit of it. I don't understand that there is any necessity of continuing a matter upon which you know the ruling of the court. It is sustained on the ground that it is immaterial.

Mr. Jones: Except.

Q. Did you make an effort to have your case set down for trial so you could be here?

A. I made an effort to get in touch with Mr. Keith and get him to do that.

Q. To get the case set for trial at some definite day of court?

A. Yes, sir.

Q. Did you succeed in doing that?

A. I never succeeded in reaching Keith.

Q. When were you taken in custody in New York?

A. May 19th, I believe.

Q. And you were brought back here to Texarkana?

A. That is, brought to Fort Smith and then here to Texarkana.

Q. Mr. Kercheval, were you still entirely without means to come?

A. Yes, sir.

Q. Were you confined here in the Miller County jail?

A. Yes, sir.

Q. How long was it before you were able to make a new bond?

A. 120 days.

Q. Since that you have been out on this bond fixed by the court at $10,000.00?

A. I have.

Q. Since you got out—when you got out of jail did you have any money at all?

A. I did not. About $20.00 I think.

Q. Was that all the money you had?

A. Yes, sir.

Q. Since then where have you been in business?

A. Fort Worth, Texas.

[fol. 394] The Court: Now I think that has all been gone over.

Q. You went immediately from here to Fort Worth?

A. Yes, sir.

Q. And been in business out there ever since?

A. Yes, sir.

Cross-examination by Mr. Shaver:

Q. Where were you on December 12th when this indictment was returned against you?

A. In the Federal Building here in Texarkana.

Q. And this case was set down for February 12th, was it not?

A. Set down for appearance February 12th.

Q. You were to be here on February 12th?

A. I was.

Q. Now you say after the indictment was returned and before you left here you had a conversation with Mr. Arterberry?

A. Yes, sir.

Q. In which he agreed to recommend a fine and jail sentence in your case?

A. Yes, sir.

Q. And you were to be back here on the 12th of February?

A. Yes, sir.

Q. You didn't come?

A. No, sir.

Q. Didn't you write a letter to Mr. Arterberry from New York on February 9th, asking if this matter couldn't be passed for a short while?

A. I wrote a letter. I don't have a copy. If you will show me the letter I will be glad to identify it.

EXHIBIT No. 1

New York City, N. Y., 2 9 24.

Mr. H. L. Arterberry, Spec. Ass't U. S. District Atty., Texarkana, U. S. A.

DEAR MR. ARTERBERRY: I came here some ten days ago on a (legitimate) financial deal that I expected to close in time to appear at Texarkana Court Feb. 12, 1924. I find today it is going to require a few days longer to complete this deal so I can get my commission.

To be able to complete this transaction means a great deal to my wife and self (as you know most oil men are broke) and in fact will give me sufficient finances to pay my debt to the court.

Therefore I am simply asking you to grant me the privilege of appearing before the court to make my plea the last days of this session; this gives me time and works no hardships on anyone concerned.

Under no condition do I wish to put my bondsmen to [fol. 395] one moment of worry, or the Gov't to any additional expense in my case.

I want to reassure you that it is my desire to get this matter settled at the earliest possible date. I am simply

asking for the longest extension you can give so that I may be assured of sufficient time to complete my deal.

Thanking you for all courtesies, I beg to remain, most respectfully,

Robert D. Kercheval.

Hotel Seville, 117 West 58th Street, New York City.

P. S.—Please notify the date I must appear."

Q. I will ask you if that is the letter?

A. Yes, sir.

Q. You made no statement on account of not coming on account of sickness?

A. I did not.

Q. I will ask you if you didn't receive a wire from the district attorney advising you that you would have to be here on that day?

A. I received a wire and the contents was similar to that.

Q. I will ask you if you didn't wire back that you were coming?

A. As I remember, I wired three different wires I am coming.

Q. But you didn't come?

A. I didn't that day.

The Court: Did you mean some other day?

(No audible answer.)

Q. Now then you got a wire from Mr. Langley, the district attorney, that you would be expected to be here on the 12th as stated?

A. I received some kind of telegram.

Q. Well, you sent that in answer to that telegram? You responded "I am coming?"

A. Similar words to that.

Q. You were notified then that you were to be there on the date it stated?

A. I don't say it is the 12th. I don't say what was in that telegram positively, without seeing it.

Q. But you didn't come after you said you were coming?

A. I didn't come on that date.

Q. The only time you did come was when you were brought by the marshal in May?

A. It was.

Q. Do you know whether or not your bond was forfeited because of your non-appearance?

A. I don't know.

Q. You learned afterwards it was?

A. I did.

Q. Now when you got here in May, you got here about the 19th of May?

A. I think it was.

Q. You entered your plea of guilty on the 24th of May?

A. I beg you pardon. I said I left New York the very day I was arrested.

[fol. 396] Q. On the 24th of May I will ask you if in the district attorney's office, at which time Mr. Ira Ross was present, in which you were discussing your pleading guilty to this charge, and Mr. Langley told you then that any agreement or promises ever outstanding that had heretofore been made, was all off because of the fact that you had not come here, on the date you were due, and that if you pleaded guilty it would be upon your own voluntary motion and he would not make any recommendation at all?

A. Mr. Langley told me he would not make any recommendation, but he didn't tell me—I didn't tell him anything about Mr. Arterberry.

Q. Well, after he then told you that, you then came into court voluntarily and entered your plea of guilty?

A. I did.

Q. I will ask you if Judge Youmans didn't turn to Mr. Langley and ask him if he had any recommendations to make in your case and he said he had none?

A. I recall his only asking me if I had anything to say.

Q. Do you recall the other?

A. I don't believe I do.

Q. Do you recall the judge turning to me and asking me?

A. No.

Q. I will ask you if Judge Youmans didn't turn to you and say: "Mr. Kercheval, have you anything to say?"

A. I think my answer was "Nothing to say."

Q. Wasn't Mr. Arterberry in town that day?

A. I think he was in the court room.

Q. Did you ask Mr. Arterberry to make any statement in connection with your case?

A. I did not.

Q. You made no request?

A. No, sir.

Q. Now I will ask you if you didn't on some days after that file a motion in this court asking the court to reduce the punishment assessed against you?

A. Yes, sir.

Q. I will ask you if in that motion—you hadn't pleaded guilty and that you did not ask in that motion for the judgment to be set aside?

A. I would like to see that before I state it.

Q. Look and see if it isn't signed and sworn to by you?

A. Yes, sir.

Mr. Shaver: We offer this in evidence with the privilege of putting in a certified copy.

[fol. 397] EXHIBIT IN EVIDENCE

No. —

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, TEXARKANA DIVISION

UNITED STATES, Plaintiff,

vs.

ROBERT D. KIRCHEVAL, Defendant

Motion to Set Aside Judgment and Order Sentencing Defendant, Robert D. Kircheval, to Three Years' Imprisonment and for Reconsideration of the Penalty to be Imposed

Your petitioner, Robert D. Kircheval, represents and shows to the court that at the November term, 1923, of this court, he was indicted for fraudulent use of the United States mail, and that on May 24th, 1924, he entered a plea of guilty to said indictment and was thereupon by the judg-

ment of this court sentenced to three years imprisonment in the penitentiary on said plea of guilty.

Your petitioner respectfully moves the court to set aside and annul said judgment of the court under which he was sentenced to three years in the penitentiary on his said plea of guilty and to grant to your petitioner an opportunity to present to the court for its consideration the facts and circumstances under which said plea of guilty was entered, and also the facts showing your petitioner's connection with and the acts and things done by your petitioner in and about and relating to the various transactions recited in said indictment.

And your petitioner respectfully represents to the court that the sentence of three years imposed upon him on his plea of guilty under the facts and circumstances, is excessive and should be annulled and set aside for the following reasons:

On the evening of the 11th of November, 1923, I met Mr. S. S. Langley in front of the Cosmopolitan Hotel and went over with him to the depot and he, my wife and myself sat down together to talk over the matter. I told him I had been put under bond to appear on November 12th and that I was anxious to get back to Dallas that night and I would be glad if I would be allowed to go, and that I would return whenever requested to do so. Mr. Langley told me that these oil cases were in the hands of Mr. Arterberry and that he was in absolute charge of all oil cases and whatever Mr. Arterberry would do or did in relation to these cases would be satisfactory to him. He stated in this connection that Judge Shaver was associated in these cases for the Government. I saw Mr. Arterberry the next morning, November 12th, 1923, in the District Attorney's office in the Arkansas Federal Building and he promptly agreed that I might return to Dallas and be subject to call.

On December 12th, after the indictment was returned, Mr. Marshall in the presence of Mrs. Kircheval told me that [fol. 398] he had had an interview with Mr. Arterberry, Mr. Shaver and Mr. Ross and that he had an appointment to meet them in the Federal Courthouse on Texas side that afternoon in relation to the indictment against me. Marshall met Mr. Arterberry there that evening and my wife

and I waited outside of the building during the interview. After the interview Mr. Marshall came out of the building and stated to me that Mr. Arterberry had consented to recommend to the court on my pleading guilty that my punishment be three months in jail and a fine of One Thousand ($1,000.00) Dollars. I went into the Texas Federal Building and saw Mr. Arterberry and tried to induce him to recommend a fine of Twenty-Five Hundred ($2,500.00) Dollars and no imprisonment. Mr. Arterberry stated that he did not believe that the court would accept this recommendation if he made it, but that he was positive that if I pleaded guilty the court would act upon his recommendation that I be fined One Thousand ($1,000.00) Dollars and three months imprisonment and that this would be the penalty the court would impose on me.

I was to appear in court on February 12th, 1924. On or about February 8th, 1924, I was dangerously ill in New York City with double pneumonia and was confined to my room at 18 West 72nd Street, and I then wrote a letter to Mr. Arterberry saying that I was sick and I also stated to him in that letter that I was on a deal in New York which required my personal attention and that I would appear in the court at Texarkana as soon as possible and that I would put the Government to no expense in bringing me to Texarkana. I also stated to Mr. Arterberry in this letter that I was broke and had no money and that it was necessary for me to put over this deal to enable me to come to Texarkana.

Before writing to Mr. Arterberry I conferred with my attorney in New York and discussed with him whether or not I should send a doctor's certificate as to my condition. My attorney told me that he did not think this was necessary and advised that I write the facts to Mr. Arterberry which I did.

I also wrote to my bondsmen and informed them that I could not be present in Texarkana on February 12th and told them I had no money to employ an attorney at Texarkana and suggested to them that they employ an attorney there to appear for me and make statement to the court explaining why I could not be present on February 12th. It now appears that they did not write to an attorney at Tex-

arkana nor employ one there. I did not know this until after I came to Texarkana.

On February 12th I received the following telegram from Mr. S. S. Langley:

[fol. 399] Texarkana, Ark., Feb. 12, 1924.

Robert D. Kersheval, care Hotel Seville, 117 West 58 St. New York, N. Y.:

You should appear here today stop advise if you are coming.

S. S. Langley, U. S. Attorney.

On the same day I replied to this telegram as follows:

New York City, N. Y., Feb. 12, 1924.

Attorney S. S. Langley, Federal Building, Texarkana, Arkansas:

Answering message, I am coming.

R. D. Kircheval.

On February 20th, 1924, I received a telegram from Mr. George E. Keith, one of my bondsmen, as follows:

"Wire immediately let me know when you will arrive Texarkana."

I replied to this telegram on the same day:

"Answering please secure attorney to appear for me and enter my plea not guilty stop sudden attack of pneumonia prevents my appearance at this time in person stop I wrote attorney to appear for me but received no response stop attorney here advises that you can have attorney there enter my plea stop advise name of attorney and trial date so I may make arrangements to appear for I will come."

On February 21st Mr. Keith wired me as follows:

"Leave on next train for Camden important answer immediately."

To this telegram my wife replied by night letter, February 21st as follows:

"Robert better but cannot leave yet. Wired you Texarkana yesterday how to proceed. Did you get message. If not call Western Union there. Tried to phone you tonight wires down calling Friday night after eight."

Mrs. Robert Kircheval.

On the morning of May 24th I went into Mr. Langley's office and shook hands with him and he asked me why I wired him as I did and did not come, and in reply I explained fully to Mr. Langley why I had not appeared sooner and told him that my telegram did not state any definite date when I would appear and he did not wire me in reply to my telegram what day to come. I told him that my wife was without means or sustenance and that I expected to put over a deal any day which would bring money to take care of my wife in any event as to the result of this prosecution, and I fully expected to be able to put this deal over [fol. 400] at any time. I told Mr. Langley that my wife was not a business woman and that she had never earned a dollar since we were married, eighteen years ago, and that I thought as I was not able to appear on the 12th of February that matters would stand until the time the case was set down for trial in May.

I told Mr. Langley that I was in business in New York and was in an office at 27 William Street in the most prominent business district of the city; that I was in the office of C. J. Taylor & Company and was sending out mail daily giving this address and was calling up business connections on an average of fifteen calls a day and that I was well known in that district, all of which went to show that I was not trying to avoid the prosecution in this case. Mr. Langley stated to me that he would not himself make any recommendation in this case. I certainly did not understand from Mr. Langley that Mr. Arterberry would not make the recommendation that he promised me he would make, but in view of my conversation with Mr. Arterberry and his promise to me, I fully expected that if I entered a plea of guilty that Mr. Arterberry would make these recommendations to the court and I entered my plea of guilty on his assurance that he would make the recommendations, and in entering a plea of guilty I relied upon his promise and

would not have entered a plea of guilty if I had not fully expected and relied upon Mr. Arterberry's promise that he would recommend to the court that on my plea of guilty my punishment would be One Thousand ($1,000) Dollars fine and three months confinement. I was utterly surprised and dumbfounded when Mr. Arterberry failed to make this recommendation, and the court immediately sentenced me without any recommendation from Mr. Arterberry.

My relation to the several transactions recited in the indictment and the acts and things done by me in this respect are and were as follows:

I was trustee in the following concerns:

1. Poindexter Royalty Syndicate

This trusteeship owned one-fourth royalty on five hundred acres in what is commonly known as the Stephens field. This one-fourth royalty on five hundred acres was divided in one-thousand parts each part being offered for sale at Twenty-Five ($25.00) Dollars. We sold about four hundred parts at Twenty-Five ($25.00) Dollars each. Ten Thousand ($10,000) Dollars. This lease was owned by the Standard Oil Company of Louisiana and they began drilling on this lease on March 20th, 1923. The Standard Oil Company capped the well and there was no production as far as I know. It is usually understood that when a well is capped it is a producing well or that they have found strong indications of oil. The Ten Thousand ($10,000) [fol. 401] Dollars received for the royalty was used in paying for the interest in the royalty, expenses of operating the trust, all of which is shown by the books.

2. American Finance Corporation

This was a brokerage business and advertised to sell stocks of any and all companies operating in what is commonly known as the Smackover field, which concern received the ordinary brokerage as paid by various concerns that wished to sell their stocks. This Company did not take in over One Thousand ($1,000) Dollars and the expenses exceeded the amount of money taken in.

3. Smackover Jack Pot

This company bought, sold and handled leases, productions, and other business enterprises connected with the oil industry. The trust agreement provided for One Million ($1,000,000) Dollars which amount was later increased to Five Million ($5,000,000) Dollars, divided into units of Fifty ($50.00) Dollars each. This trusteeship received about Ten Thousand ($10,000) Dollars in money from the sale of the units. This money was expended in the buying of an interest in a drilling well, the buying of an interest in a lease and the general expenses of the operation of the trust including the office force. These expenditures exceeded the amount of money taken in, Ten Thousand ($10,000) Dollars, and I paid the balance out of my own pocket.

In handling the business of the three companies above mentioned I did not receive a dollar for salary and only used sufficient for bare living expenses. I devoted my entire time and attention to the business and my wife assisted me in handling the business without salary, and neither she nor I received a dollar for our services. The net result of the operation of the three concerns was that I paid out of my own individual funds as much as Twenty-Five Hundred ($2,500.00) Dollars cash and gave personal notes for Forty-Five Hundred ($4,500.00) Dollars which are now outstanding and which I am at this time unable to pay. All of the expenses in the operation of these enterprises were ordinary and legitimate expenses and the books of the three companies show this and also all receipts and disbursements. Balance sheets have been taken from the books and were mailed to Ira Ross, Post Office Inspector at Little Rock, Arkansas, at his request. The books are in Waco, Texas, and are available and will be presented if desired. I kept Mr. Ira Ross, Post Office Inspector of this District, located at Little Rock, Arkansas, fully informed of my activities and mailed him duplicate copies of the various letters I sent out which embraced practically all of the business and furnished him a complete statement on his request prior to the indictment.

[fol. 402] Wherefore, your petitioner respectfully submits to the court that on the facts stated which are the true

facts in this case, if your petitioner was guilty of violating the postal laws of the United States in any particular, such violation was technical and involved no moral terpitude, and the sentence imposed upon him by the court on his plea of guilty is excessive, and in view of all the facts and circumstances your petitioner submits that the court should set aside and annul the sentence of three year's imprisonment imposed upon him and impose the sentence of One Thousand ($1,000) Dollars fine and three months' imprisonment which Mr. Arterberry stated to your petitioner that he would recommend to the court, all of which is respectfully submitted for the consideration of the court.

Jones & Jones, Attorneys for Defendant.

Robert D. Kircheval being duly sworn on oath says that the facts stated in the foregoing petition are true.

Robert D. Kercheval.

Subscribed and sworn to before me this 6th day of June, 1924. Wm. S. Wellshear, Clerk. J. Warren Stevens, Deputy Clerk. (Seal of the District Court, U. S. A., Western District of Arkansas.)

Filed Jun. 6, 1924. Wm. S. Wellshear, Clerk, by R. F. Salzman, Deputy Clerk.

EXHIBIT IN EVIDENCE

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, TEXARKANA DIVISION

No. 1901

UNITED STATES

vs.

ROBERT DAVID KERCHEVAL

Response to Motion to Set Aside Judgment and Order Sentencing said Defendant

Now comes H. L. Arterberry, Special Assistant to the United States Attorney, for the Western District of Arkansas, and for response to the motion filed by the plaintiff,

Robert David Kercheval, herein would represent and show to the court as follows:

That at the November term, 1923, of this court, the defendant, Robert David Kercheval, was indicted on a charge of violating section 215 of the Penal Code to-wit: Using the mails to defraud. The said indictment was returned in open court on December 12, 1923, that subsequent to the return of said indictment, the defendant, Robert David Kercheval, came to see this respondent with reference to his [fol. 403] entering a plea of guilty to said charge and asked what recommendation would be made with reference to the sentence which would be imposed by the court. Your respondent immediately got in touch with the postoffice inspector, Ira Ross, who had charge of this case and who worked up the facts upon which this case was presented. Mr. Ross advised that he thought a fine and jail sentence would be sufficient punishment upon the defendant's plea of guilty to the charge which was to be had on February 12, 1924. I advised the defendant to be present in court on the date indicated, to-wit: February 12, 1924, at which time the court had set for hearing of all dilatory pleas to various indictments that had been returned into court, charging violation of section 215 of the Penal Code. The defendant, Kercheval, advised that he would be present on the date and insisted that the Government go to no further trouble or expense with reference to his case that he would enter a plea of guilty to the charge on February 12, 1924, as hereinabove stated.

Your respondent would further represent and state to the court that he advised the defendant, Kercheval, that his recommendations with reference to penalty imposed might not be sought as the court was not bound by any recommendations made by the District Attorney or any of his assistants and the defendant so understood and was so told.

Your respondent would further show that the defendant failed to make his appearance on the date agreed upon, viz.: February 12, 1924, but instead a letter was received from the defendant who was then in New York City stating that he was busy and was trying to make some money and upon receipt of said letter the District Attorney immedi-

ately wired the defendant that his appearance was desired in this court at once, to which the defendant responded, "I am coming." Signed Robert David Kercheval, which was the last notice that was had from the defendant as to where he was, what he was doing or what he intended or expected to do in the future with reference to his case and immediately thereafter "Nisi Judgment" was taken upon the defendant's bond.

Your respondent would further represent to the court that he had no further dealings or transactions with the defendant with reference to his said case, other than is hereinbefore mentioned. That upon the return of the defendant here from New York by his bondsmen this respondent had no further conversation with the defendant with reference to any recommendations whatsoever and your respondent is informed by the District Attorney that he advised the defendant at said time that all promises with reference to any such recommendations was of no further force and effect and that none would be made and that the [fol. 404] defendant was not misled in any way by any one to induce him to enter his plea of guilty as stated by him in said motion.

Wherefore your respondent submits the above as a response to the allegations as set forth in the defendant's motion to have the sentence of the court annulled and set aside, all of which is respectfully submitted for the consideration of the court with respect thereto.

H. L. Arterberry, Special Assistant U. S. Attorney.

Filed Jun. 6, 1924. Wm. S. Wellshear, Clerk, by R. F. Salzman, Deputy Clerk.

Q. Now on the motion, Mr. Kercheval, I will ask you if testimony was not introduced before the court?

A. There was.

Q. You took the stand and testified?

A. Yes, sir.

Q. And you told the court then that you had taken into these syndicates some $21,000.00?

A. I believe that is the amount.

Q. And that you had returned none of that to the investors?

A. Yes, sir.

Q. I will ask you if you didn't also state to the court in the hearing on that motion that the Jack Pot enterprise was a complete loss?

A. I don't remember making that statement, no, sir.

Q. What did you state?

A. I don't remember just what the statement was regarding that.

Q. Well, after the court heard all this testimony, the court declined to grant the motion, didn't he?

A. In what way do you mean?

Mr. Jones: The record shows that and the records have been introduced.

The Court: He may answer.

Mr. Jones: Exception.

A. The court set aside the sentence.

Q. I will ask you if the court at that time didn't refuse to set it aside and declined to grant the relief prayed for in the motion?

The Court: Answer the question.

A. I don't understand it.

Q. I asked you if the court didn't decline to grant the motion or the relief prayed for, or to disturb the judgment that had been rendered?

A. I am honest with you. I don't know what that means.

Q. Didn't the court decline to set the judgment aside as prayed for in your motion?

A. He declined to give me three months in jail.

[fol. 405] Q. Then Mr. Jones asked the court to permit you to withdraw your plea of guilty and enter a plea of not guilty, didn't he?

A. Not until after the Judge had said—I don't remember just exactly what he said.

Q. Don't you know that that was after he had declined to grant the relief prayed for in your petition?

A. No, sir.

Q. Didn't the court say—don't you remember the expression of the court that it would be a judicial farce to put a man in jail when he got away with $21,000.00?

A. I don't remember that.

Q. And finally the judge said he had decided to set aside your sentence and let you plead not guilty?

A. I remember the Judge set it aside.

Q. The same facts exist today as existed then, did they not, with reference to your transactions?

A. Well, there are different conditions exist- today.

Q. With reference to what you had done?

A. Oh, no.

Q. The same facts were in your knowledge and your possession when you pleaded guilty, that you have now?

A. How was that?

Q. I say you had the same facts within your knowledge when you pleaded guilty, that you have now?

A. No, sir, I know a lot of facts now that I didn't know then.

Q. I am asking about the case before the court. I will ask you again if the facts were not the same, so far as this charge was concerned, at the time you pleaded guilty, as they are now?

A. Yes, sir, same charge.

Q. And you had knowledge of those facts. Why didn't you ask Mr. Arterberry to say something when the court asked Mr. Langley and myself if we had any recommendations?

A. I take*n* it for granted that he would.

Q. You heard the judge ask Mr. Langley and me and you heard us say we didn't have any recommendations?

A. I relied on Mr. Arterberry doing as he agreed.

Q. That was when you were indicted. He never told you that then. What did you go and talk to Mr. Langley for?

A. I was delivered to Mr. Langley's office. The Marshal brought me up here.

Q. You asked the Marshal to let you go in there?

A. I don't remember how that was.

Q. Do you remember hunting Mr. Langley?

A. Yes, sir.

Q. Why didn't you ask for Mr. Arterberry then?

A. I didn't see Mr. Arterberry.

Q. Did you tell Mr. Langley what Mr. Arterberry had told you?

A. I did not.

[fol. 406] Q. He told you that the recommendations were off?

A. No, sir.

Q. What did he tell you?

A. He told me that he wouldn't make any recommendations.

Q. That is what I asked you. I will ask you if he didn't state to you right there in the office when you went in there that any recommendations that had been made by his assistants had been made without authority and it was all off?

A. He did not.

Q. Wasn't Mr. Ross in the office when that occurred?

A. No, sir.

Q. And Mr. Langley didn't make that statement to you, if he didn't tell you that if any of his assistants had made any recommendations or promises to you, that it was without authority and that it was all off?

A. No.

Q. And that there would be no recommendations?

A. He said he would make no recommendations?

Q. He was the man you were talking to?

A. I was talking to him at that time.

Q. You were not hunting Mr. Arterberry and was talking to Mr. Langley at that time?

A. No, sir.

Q. So you pleaded guilty with full knowledge of the situation?

A. No.

Q. What was lacking?

A. I didn't have Mr. Arterberry's statement that he would make no recommendation.

Q. You didn't ask for it. The only thing you were complaining of was that you got more than you ought to?

A. I didn't think I ought to have got anything and I just agreed to take a light sentence.

Q. And you got more than you thought you were going to get?

A. I certainly did.

Q. When did you say you went down to Camden to go into this oil promotion?

A. I went to Camden in December, as I remember it.

Q. 1922?

A. 1922.

Q. Where did you go there from?

A. New York City.

Q. You had been in the promotion game in New York?

A. I had not.

Q. Wasn't you connected with the Daskos for selling stock?

A. I was not.

Q. Wasn't you indicted in New York?

A. The Tex-York Company.

Q. Wasn't you up there selling stock in New York in Texas oil?

A. I was not.

Q. Wasn't you indicted up there for your connection with that concern?

A. I was.

Q. That indictment has not been disposed of?

A. I don't know.

[fols. 407-440] Q. Now you were engaged in selling some kind of stock.

A. I was engaged in selling general securities.

Q. Well, did you sell any of the Tex-York Company?

A. No, sir.

Q. The Texas Oil Producing Co., wasn't you one of the trustees in the Texas Oil Producing Company?

A. I was not.

Q. What connection did you have with it?

A. I had a connection as sales manager.

Q. The sales manager does not have anything to do with the selling of stock?

A. That was away back in 1919.

Q. Wasn't you in New York in 1919?

A. I was for a short time.

Q. How long did you stay in New York?

A. In 1919?

Q. Yes.

A. I think I was there about thirty days.

Q. What were you doing then?

A. I went up there to deliver that Texas Oil that you are talking about to a brokerage house to sell.

Q. That was a Texas corporation?

A. No, sir.

Q. Declaration of Trust?

A. Yes, sir.

Q. That seems to be your favorite manner of operating isn't it?

A. Well, I don't know.

Q. Well, who does?

A. I was just trying to think, Your Honor. I believe that is about as good a method of operation as any. The Magnolia Petroleum Company operates under a declaration of trust.

Q. So in 1919 you were operating with the Texas Oil Producing Company. Where were your headquarters?

A. Headquarters as I remember it was in Waco, Texas.

Q. How long had you been connected with that when they sent you to New York?

A. It had just been organized.

Q. And you went up to New York for what purpose?

A. To secure a firm to underwrite the issue.

Q. Explain to the jury what you mean.

A. They were to take over the issue of stock and dispose of it upon some basis that we might agree upon and the Texas Oil was to have the proceeds derived from that stock for operating purposes.

Q. That is the one you were indicted for in New York?

A. That is the one.

[fol. 441] S. S. Langley, a witness sworn on behalf of the United States, testified as follows:

Direct examination by Mr. Shaver:

Q. Your name is S. S. Langley?

A. Yes, sir.

Q. What official position do you hold?

A. United States District Attorney for the Western District of Arkansas.

Q. How long have you been filling that position?

A. Since May 21, 1921.

Q. You were acting as United States Attorney for the Western District of Arkansas at the time of the indictment of the defendant?

A. I was.

Q. I will ask you if you had a conversation with the defendant prior to the return of the indictment into court while the matter was under investigation?

A. Yes, sir, twice I think.

Q. I will ask you if in that conversation there was anything said by the defendant to you with reference to his being here at a certain time?

A. Yes, sir.

Q. State to the jury what that conversation was.

A. The first conversation with regard to Mr. Kercheval being here at a certain time was some time just prior to the returning of the indictment. I don't remember the exact date.

Q. I will ask you at that time he was not already under bond?

A. Mr. Kercheval represented that he was under bond and he wanted permission to go back to Ft. Worth, was the only question presented to me, and wanted to know what time to return and I told Mr. Kercheval with regard to that proposition, which was the only thing being talked about, the time for him to return back to answer, and I told him that I wasn't advised as to when he was needed, and for him to see Mr. Arterberry, the assistant, and any arrangements he made with Mr. Arterberry concerning his return would be entirely satisfactory to me.

Q. That was before the indictment was returned?

A. That is my recollection.

Q. I will ask you if it isn't a fact that the grand jury recessed during November until the 12th of December?

A. Yes, sir.

Q. And it was during that time that you had your conversation with Mr. Kercheval?

A. Yes, sir.

Q. Well, do you recall whether or not he was here on the 12th of December?

A. About that time, when the indictment was returned. My recollection is that he was about that time. I don't remember the exact time. I think he was here.

[fol. 442] Q. Did you have any conversation with him with reference to the matter further?

A. No, sir, not at that time.

Q. I will ask you if it was not a fact that the 12th of February was set down as a date to plead to these indictments?

A. That is my recollection.

Q. Well, was Mr. Kercheval here on the 12th of February?

A. I think he was about that time.

Q. I will ask you if you didn't receive a letter from him and he was not here the 12th of February? You heard the letter read here yesterday dated February 9th?

Q. Yes, sir, that letter was handed me by Mr. Arterberry.

Q. Did you or did you not wire Mr. Kercheval in response to that letter?

A. I did.

Q. You heard the message read that is set out in the motion, you advised him that he must come?

Mr. Jones: Wait a moment.

The Court: I don't understand there is any dispute about that telegram.

Mr. Jones: If that is the telegram, I withdraw my objection.

Mr. Shaver: That is the telegram I am inquiring about.

Q. Did you get a response from Mr. Kercheval to your telegram advising him he must be here?

A. I did.

Q. And that is the telegram set out in the motion, is it not?

A. Yes, sir.

Q. That he was coming?

A. Yes, sir.

Q. Well, he did not come, I believe he said?

A. No, sir, he didn't come at that time.

Q. Well, was there any steps taken in the case further at that time?

A. Well, just within a few days of the time after receiving that telegram, I waited until Mr. Kercheval would have had time to have gotten here and then I took a forfeiture on his bond.

Q. Now after that when did Kercheval appear here?

A. Now, let me modify that statement. I don't think I was present when the forfeiture was taken. I think it was a day or two after that, we waited for Kercheval, and I think you or Mr. Arterberry took the forfeiture.

Q. Well, after the bail bond was forfeited, when did you see Kercheval?

A. I don't remember the exact date. The date is in this pleading, whatever date that was.

Q. Well, he was arrested some time in May and brought here from New York?

A. It was some time in May, 1924.

Q. Now, after he had been brought back here and was in jail, did you see him before he entered his plea of guilty?

A. Yes, sir.

[fol. 443] Q. State to the jury the circumstances under which you saw him and what occurred, and what was said?

A. Mr. Kercheval came to my office back here in the building the morning before he entered his plea of guilty, and I am under the impression that he came in and requested as I remember it, he came in and requested an interview. I know that I had not sent for him. He came in and wanted to talk with me. He sat down in the room there, he was in the custody of the marshal.

Q. Who was in the room besides yourself?

A. Well, Mr. Ira Ross.

Q. Tell the jury the conversation you had with Mr. Kercheval in your office that morning?

A. The substance of the conversation amounted to this: Mr. Kercheval told me that there had been promises made to him by Mr. Arterberry concerning certain recommendations to be made to the court in case he plead guilty. I advised Mr. Kercheval very positively and very plainly that if such promise had been made by Mr. Arterberry or my assistants, that it was without my knowledge or consent and that he was not authorized in doing it, and there would not be any recommendation made, if he was going to enter a plea of guilty there would be no recommendation made by me or my office or assistants; that that was all of it; that he had gone away and had not appeared when he said he would, and that any promise or understanding about it

that there had been, that he could consider that all off; that there would be no recommendations made. I made that statement to him very plainly and in few words before he came on in and entered his plea. I went further than that. I told him he could take his own course and use his own judgment about what he would do.

Q. Now, it was after that statement by you in your office that he did come in and plead guilty?

A. Yes, sir.

Q. Were you in the court room when he pleaded guilty?

A. I was.

Q. I will ask you if the judge didn't turn to you and ask you if you had any recommendations?

A. That is my recollection.

Q. Did you tell him?

A. I told him I had none.

Q. Do you recall whether the judge turned to me and asked me if I had any recommendations?

A. I think he did.

Q. Do you recall what I said?

A. I think you made the same reply.

Q. I will ask you if the judge didn't ask Mr. Kercheval if he had anything to say?

A. That is my recollection of what happened.

Q. That is all that transpired so far as you know with reference to this plea of guilty?

[fol. 444] A. That is in substance all that did happen so far as I am concerned.

The Court: Do you recall any requests that the court made for information with regard to the facts in the case after Mr. Kercheval had declined to make a statement?

A. Yes, sir; I think questions was asked and there was probably a statement made upon the facts.

Mr. Shaver:

Q. I will ask you if the judge didn't call on Mr. Ross?

A. I don't remember whether the court asked Mr. Ross, or asked you or me, and we requested Mr. Ross to make a statement of the facts.

Q. And that is your recollection that is the way it was done?

A. That is my recollection.

The Court: Do you remember what statement was made to the court in that connection at that time?

A. Well, only briefly in substance. I couldn't give it in detail today.

Q. Do you remember the amount of money that was stated that was obtained by these operations?

A. Yes, sir; my recollection that was stated about twenty or twenty-one thousand dollars.

Cross-examination by Mr. Jones:

Q. Mr. Langley, your recollection was first that Mr. Kercheval was here on the 12th of February, and then you corrected that. You have a great many cases for the Government involving this proposition?

A. I certainly have.

Q. The records and books are full of them?

A. A good many, right numerous.

Q. And they are all in your hands and under your control?

A. Well, I am supposed to have the control of them.

Q. Now, you don't pretend to carry in your mind all these things, do you?

A. Certainly not.

Q. It would be humanly impossible?

A. I don't think it would be possible; I couldn't do it.

Redirect examination by Mr. Shaver:

Q. Your recollection is clear, or is it not clear as to what transpired?

A. It is very clear as to what I said about it because of the fact that shortly after the plea this motion coming up. That brought it to my mind.

Cross-examination:

Q. When was this motion tried?

A. It was just a few days after the plea was entered.

Q. Do you remember when it was?

A. I think it was along towards the last of the May term, 1924.

Witness excused.

[fol. 445] IRA ROSS, a witness sworn on behalf of the United States, testified as follows:

Direct examination by Mr. Shaver:

Q. What is your name?

A. Ira Ross.

Q. What is your business?

A. Post office inspector.

Q. I believe you were on the stand the other day?

A. Yes, sir.

Q. You are the same Ira Ross that testified in this case the other day?

A. Yes.

Q. And you were one of the inspectors in charge of this investigation?

A. Yes.

Q. I will ask you, Mr. Ross, if you remember the morning that Mr. Kercheval came into Mr. Langley's office, the same being the day that he entered his plea of guilty here in court?

A. Yes, sir.

Q. I will ask you if you were present in Mr. Langley's office when Mr. Kercheval came in?

A. I was.

Q. You were there when he came in?

A. Yes, sir.

Q. I wish you would state to the jury what conversation occurred there between Mr. Kercheval and the District Attorney. Just turn around and tell them in your own way what that conversation was.

A. Well, the conversation was about as related by Mr. Langley. Mr. Kercheval said that he had been made promises by Mr. Arterberry to recommend a jail sentence in the event that he pleaded guilty on February 12th that he was willing to plead guilty and Judge Langley told him that he knew nothing about any promises; that if there had been any made that it was without his authority, and if he pleaded guilty he would have to do so without any recommendation from his office. And Mr. Kercheval said that he would enter his plea under those circumstances.

Q. The matter was made plain there, was it?

A. Yes, sir.

Q. And he then said he would enter his plea under those circumstances?

A. Yes, sir.

Q. Did he, or did he not, come into court and enter his plea?

A. I think he came out of the office in here.

Q. Were you in here?

A. I was.

Q. I will ask you whether or not you recall whether you made any statements to the court with reference to the facts?

A. Yes, sir, I was asked for a statement of the facts and related as briefly as I could the organization he was interested in and the approximate amount of money realized, so far as my investigation had shown.

Q. That was in response to an inquiry from the Judge upon the bench?

A. Yes, sir.

[fol. 446] Q. Did Mr. Kercheval have anything to say?

A. No, sir.

Q. He made no statement with reference to it at all?

A. None at all. I believe he probably admitted that the figures I gave were approximately correct.

Q. That was on the trial of the motion?

A. Possibly it was.

Q. He admitted then on the stand that the amount of money obtained was approximately $21,000.00?

A. Yes, sir.

Cross-examination by Mr. Jones:

Q. Isn't it a fact, Mr. Ross, that you were not in the office when Mr. Kercheval came in; that the conversation had proceeded to some extent before you came in?

A. No, sir, I think I was in the office.

Q. Didn't you testify at the hearing here of that motion that you were not in the office at the time Mr. Kercheval came in, but you came in afterwards?

A. I don't think so.

Q. Are you sure you didn't testify that?

A. I am pretty sure I didn't.

Q. I ask you if you are sure you did not testify that?

A. That is my recollection that I did not.

Q. Were you with Kercheval in the office when Mr. Arterberry made the statement to him that he would recommend to the court a thousand dollar fine and three months in jail?

A. No, sir.

Q. Where were you when that was made?

A. I don't know. I occupied one office down there, Mr. Thompson and I were working in one office and Mr. Arterberry and Judge Shaver occupied the office across the hall.

Q. That was in the Texas side Federal Building?

A. Yes, sir. And I was probably in the other office.

Q. Didn't you have a conversation with Mr. Marshall about this?

A. Marshall wa down there a number of times and he talked to me about this case, yes, sir. This one and his and Houston's, and the punishment that would be reasonable under the facts if he pleaded guilty.

Q. Well, he was talking about whether or not he could persuade Mr. Kercheval to plead guilty? Were you trying to persuade Mr. Kercheval to plead guilty?

A. No, sir. Marshall came to see me.

Q. Were you using him as a decoy to get people to plead guilty?

A. I wasn't using him at all.

Q. How was it he was talking to you about getting pleas of guilty?

A. In all those cases.

Q. What did you do with Marshall, finally?

A. Marshall entered a plea of guilty.

Q. What was he charged with?

A. Fraudulent use of the mails.

[fol. 447] Q. What did you recommend in Marshall's case?

A. Nothing at all.

Q. As a matter of fact he only served a term in jail?

A. I know he served a term in jail. I don't know whether there was any fine in connection with it.

Q. He only served a term in jail?

The Court: What is the object of that, Mr. Jones?

Mr. Jones: My object is to show presently to the jury the proposition of whether or not this man wasn't using Marshall to induce people to plead guilty, and as a compensation for that Marshall received less sentence on his recommendation.

The Court: You have already passed from that point. You asked whether he was using him as a decoy. He says he was not. And the punishment that was inflicted on Mr. Marshall has not a thing to do with this case.

Mr. Jones: Your Honor understands the purpose.

The Court: No, I am entirely ignorant and I can't see what purpose you have in asking that question.

Mr. Jones: I will state, if Your Honor please, in asking the question if he had not agreed to recommend less sentence.

The Court: And he answered that he had not.

Mr. Jones: Then I wanted to show that a slight sentence was in fact inflicted upon Marshall, to sustain the position that I take that he had recommended a slight sentence.

The Court: You had already had the answer from the witness that he had not made the recommendation. You had gotten that information fully and completely on your own inquiry, and you are bound by it. Please proceed.

Q. I will ask you if after Mr. Kercheval had served his 120 days in jail on the forfeiture of his bond, if you didn't come to him right out in this hall and ask him to plead guilty in this case, and if he did so that you would recommend a slight sentence?

A. No, sir, I did not.

The Court: When was that, Mr. Jones?

Mr. Jones: After the forfeiture and after Kercheval had been in jail.

Q. You say you did not?

A. No, sir.

Q. Didn't you talk to Mr. Kercheval along the line that his service in jail would be taken, you would recommend that that be taken into consideration in the term he was to serve in jail if he pleaded guilty?

A. I will tell you that conversation as near as I can. Mr. Kercheval asked me in the hall if he pleaded guilty

again if I would recommend that he be sentenced to the time he had been in jail and I told him I couldn't do that.

Q. You told him what?

A. That I would not do that.

Q. Mr. Ross, do you remember coming to me and talking to me about this case?

A. No, sir.

[fol. 448] Q. Do you remember coming to me and telling me of this conversation you had with Kercheval?

A. No, sir, I don't think so.

Q. Don't you remember coming to me? Do you remember coming to me and talking to me about the Kercheval case?

A. No, I don't Judge.

Witness excused.

Government rests.

R. D. Kercheval, being recalled, testified in his own behalf in rebuttal as follows:

Direct examination by Mr. Jones:

Q. Was Mr. Ross in the office when you were in there to talk to Mr. Langley?

A. He was not.

Q. How long had you and Mr. Langley been talking about this?

A. I was just about ready to leave the office and come into the court room when Mr. Ross came in.

Q. Had you had a talk with Mr. Ross before Mr. Arterberry made you this promise?

A. No, sir.

Q. Did you have a talk with him after that?

A. Had a talk with him in conjunction with Mr. Arterberry as he was in the room at the same time. Came out of his own office across the hall and walked in.

Q. His office was right across the hall?

A. Across the hall from where Mr. Arterberry was.

Q. Had Marshall made overtures to you to plead guilty in this case?

A. He had.

Q. How long had that been going on?

A. Only began that day.

Q. Did he go with you down to Arterberry's office and down to the Federal Building?

A. No, he went ahead of me and told me to come down later.

Q. Did you find him there?

A. I did, waited for him to come out.

Q. Were you informed?

A. Notified me that he could get a recommendation of three months in jail and a thousand dollars fine.

Mr. Shaver: We object to that.

The Court: Objection sustained.

Q. The next question I asked you was if you did get the promise of a recommendation would be made by Mr. Arterberry?

The Court: Are you talking about the conversation with Mr. Arterberry?

Mr. Jones: Yes, sir.

A. I immediately walked in and saw Mr. Arterberry and got that agreement from him.

[fols. 449-462] Q. What time of day was that?

A. It was after the dinner hour in the evening. Probably 7 or 8 o'clock in the evening.

Cross-examination by Mr. Shaver:

Q. Marshall was negotiating for you, was he?

A. Marshall came to me and went down to see Mr. Arterberry.

Q. He went to Arterberry as your friend?

A. I don't know how much my friend.

Q. Well, you sent him there to see Arterberry?

A. I didn't.

Q. How did he happen to go?

A. He went of his own accord.

Q. But you say he came to see you. What did you authorize him to do?

A. Didn't authorize him to do anything.

Q. Yet you waited until you got a report before you went in?

A. I didn't.

Q. But he had attended to it for you?

A. I was waiting to see what his report was. He told me he would give me one.

Q. So he was acting in there as your representative?

A. No, sir, he went in to get a report. No authority to make any kind of deal.

Q. Well, then the deal was not authorized?

A. No, no deal made between Mr. Marshall and Mr. Arterberry for me, none whatsoever.

Q. Well, you didn't come back here at the time you were to be here?

A. I did not.

This was all the evidence introduced at the trial of this cause.

[fols. 463-475] CHARGE OF COURT TO JURY

Mr. Shaver: There is one other matter, the plea of guilty.

The Court: The plea of guilty is introduced as evidence by the Government. You are to take that into consideration, that is, you will take it into consideration upon a certain condition. If you find that Mr. Kercheval made that plea of guilty and that no promise was held out to him for the purpose of getting him to make that plea, or if you find that he was notified before he made the plea that nothing that was ever said to him with reference to it theretofore would be met, then it is evidence for you to consider in connection with the other evidence in the case. If you find out however that he was included, and you are to take all the facts and circumstances into consideration—you are to take Mr. Kercheval's intelligence into consideration in connection with whether or not he could be deceived in a matter of that kind, I say if you find that he was deceived; that this was brought about by conversations that he had had with reference to it, and that he made that plea of guilty when as a matter of fact he was not guilty, then you will disregard that particular part of it and consider just the other testimony in the case. Have you any requests, Mr. Jones?

[fol. 476] In United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1926

No. 7185

Robert David Kercheval, Otherwise Called "Bob" Kercheval, Otherwise Called "Dave" Kercheval, Plaintiff in Error,

vs.

United States of America, Defendant in Error

In Error to the District Court of the United States for the Western District of Arkansas

Mr. Paul Jones (Mr. Paul Jones, Jr., was with him on the brief) for plaintiff in error.

Mr. S. S. Langley, United States Attorney, and Mr. James D. Shaver, Special Assistant United States Attorney, for defendant in error.

Before Stone, Kenyon, and Booth, Circuit Judges

Opinion—Filed May 4, 1926

Kenyon, Circuit Judge, delivered the opinion of the court.

Plaintiff in error was tried and convicted in the District Court of the United States for the Western District of Arkansas on five counts of an indictment charging him with violation of Section 215 of the Penal Code, viz., the devising of schemes to obtain money by false and fraudulent representations, and the use of the mails in carrying out said fraudulent schemes. The first count of the indictment sets forth particularly the plan and method. The others are based on different overt acts. Defendant was acquitted on the second count.

The plan or scheme in brief was as follows: defendant promoted two oil stock companies known as the Poindexter Royalty Syndicate and the Smackover Jack Pot Syndicate, [fol. 477] the latter being a trust estate formed to engage in the general oil business. The former had an authorized

capitalization of $300,000.00, divided into 10,000 units or mineral deed assignments of the par value of $30.00 each. Defendant under the name of "Dave" Kercheval was sole trustee. The Smackover Jack Pot, the other corporation, had an authorized capital of $5,000,000.00, divided into 100,000 units or assignments of interest of the par value of $50.00 each. Defendant under the title of "Bob" Kercheval was sole trustee of this corporation. Defendant also organized a brokerage company known as the American Finance Corporation for the purpose of assisting in selling shares and mineral deeds of the other two enterprises. All of these concerns had their principal place of business at Camden, Arkansas, and were dominated and controlled by defendant. The assets of these companies consisted of some leases of oil royalties.

The representations charged in the indictment as made to induce the purchase of shares and mineral deeds were many, some of them being as follows: that defendant would declare a fifty per cent cash dividend which would be paid at a future date to all holders of shares or assignments of interest in the two syndicates; that Jack Pot was not in the class of fly-by-night concerns, but was an organization built on principle which would carry forward and grow to larger successes year after year; that it was organized so as to take charge of the changing conditions in the oil industry; that the stockholders were not gambling on the outcome of the drilling of one well; that persons who bought Jack Pot shares would be in the big "whack-up" that would come within ninety days to six months; that defendant could buy production at a tremendous discount, and that he was therefore making a special offer of four $50.00 shares for $50.00, and eight $50.00 shares for $100.00; that Jack Pot was a fair, square proposition, and there was no reason why every investor would not reap a big harvest; that defendant needed hands to harvest the oil crop of dollars he was sure to make; "that the Smackover Jack Pot ante was $10.00;" "that the sky was the limit," and "there was no rakeoff;" that the Capital Syndicate Company of Denver, Colorado, had underwritten the stock of defendant, and that the Capital Syndicate would offer for public subscription Jack Pot certificates at par, that is, $50.00 each; that said securities would be

traded in throughout the United States and Canada; that the Smackover Jack Pot had made a deal whereby it had made a profit of $13,000.00 and would pay all its stockholders on April 10, 1923, a fifty per cent dividend; that parties [fol. 478] who were not lucky enough to be in on the per cent "whack-up for April, 1923," could come in for the "'divy' which defendants expected to make in May;" that parties buying Poindexter Royalty mineral deeds would become the permanent owners, and were buying something worth every cent they were asked to pay for the same; that the "Jimmy" Cox well was less than one-half mile from the Poindexter holdings—was making considerable gas and oil, and would be one of the "gusher" type wells in the Smackover field; that Poindexter warranty royalty deeds were an exceptionally good investment.

The indictment charges that all of these representations were false and fandulent; were known by the defendant to be such and were made with the purpose and intent to induce persons to pay him large sums of money for shares or mineral deed interests of the said Companies and Syndicates, and that in truth and fact large numbers of people did make purchases thereof. The indictment sets forth in the various counts letters and advertisements which were sent through the mails. Most of them contain glowing descriptions as to the future of the two Oil Companies, statements as to dividends paid, and the alluring prospects of securing something for nothing.

The crop of gullible subjects resulted in a fruitful harvest to defendant.

On each of the five counts of the indictment upon which defendant was convicted he was sentenced to imprisonment for three years in the penitentiary and to pay a fine of $300.00, the terms of imprisonment to run concurrently.

The case is here on writ of error.

We are presented with seventy-six assignments of error. Some are clearly insufficient under the rules of this court. Some present no substantial questions. Fifteen are not argued,—hence abandoned. Lee Tung v. United States, 7 Fed. (2d) 111.

We attempt to group the various assignments as there is no necessity for taking them up seriatim.

Assignment No. 1 relates to alleged error of the court in overruling defendant's motion in arrest of judgment. This

motion was an attack upon the indictment for a number of reasons (some of which had been raised upon demurrer), [fol. 479] viz., that it did not state facts sufficient to constitute a public offense against the United States; that the allegations thereof did not state the scheme, artifice or device to defraud with sufficient certainty to inform defendant of the offense with which he was charged. This court has considered similar indictments in a number of cases in the last few years, some of which arose out of the same oil fields, and this indictment is substantially similar to the indictments in those cases so recently decided by this court. In fact this case bears a very marked resemblance to them. Every question raised here as to the indictment has been passed on adversely by the court in these cases. Marr v. United States, 8 Fed. (2d) 231; Morris v. United States, 7 Fed. (2d) 785; Chew v. United States, 9 Fed. (2d) 348; Davis v. United States, 9 Fed. (2d) 826. See also as to sufficiency of the indictment, Rimmerman et al. v. United States, 186 Fed. 307, 310; May et al. v. United States, 199 Fed. 53, 61; Gould et al. v. United States, 209 Fed. 730, 734; Mounday et al. v. United States, 225 Fed. 965; Goldberg v. United States, 277 Fed. 211.

Assignments of error 5 to 17 inclusive and 44 and 45 challenge the admission of evidence. Except Assignment 17 they relate to telegrams, advertisements, letters and circulars sent to various people to persuade them to buy shares or deeds of interest in the so-called syndicates. The objection made by defendant to them is that they are evidence tending to show that defendant schemed to make other and different representations, pretenses or promises than those set forth in the indictment. Of course, there must be proof of some overt act set out in a count to warrant conviction thereon, but proof of other similar acts for the commission of which defendant could not be convicted under the indictment are nevertheless admissible as bearing on the question of fraudulent intent, which is a material allegation of the indictment. We are satisfied the evidence objected to and pointed out in these various assignments, though not set forth in the indictment, was admissible on the question of intent and as showing the character of the scheme in which defendant was engaged. In urging objec-

tion thereto it seems to us there is a failure to recognize the distinction we have pointed out. See Samuels v. United States, 232 Fed. 536; Linn v. United States, 234 Fed. 543; McKnight v. United States, 252 Fed. 687; Holloweil et al. v. United States, 253 Fed. 865; Davis v. United States, 9 Fed. (2d) 826. Assignment 17 relates to the plea of guilty [fol. 480] entered by defendant in open court. It was a formal plea and the court in its instructions to the jury was careful to guard the same telling them:

"The plea of guilty is introduced as evidence by the Government. You are to take that into consideration, that is, you will take it into consideration upon a certain condition. If you find that Mr. Kercheval made that plea of guilty and that no promise was held out to him for the purpose of getting him to make that plea, or if you find that he was notified before he made the plea that nothing that was ever said to him with reference to it theretofore would be met, then it is evidence for you to consider in connection with the other evidence in the case. If you find out however that he was included, and you are to take all the facts and circumstances into consideration—you are to take Mr. Kercheval's intelligence into consideration in connection with whether or not he could be deceived in a matter of that kind, I say if you find that he was deceived; that this was brought about by conversations that he had had with reference to it, and that he made that plea of guilty when as a matter of fact he was not guilty, then you will disregard that particular part of it and consider just the other testimony in the case."

While there was evidence of defendant that some promise had been made him by a Special Assistant District Attorney, Mr. Arterberry, as to punishment in case he pleaded guilty, the evidence of the District Attorney shows that defendant was fully informed by him before the plea that if he did plead guilty it would be upon his own volition and that no promises whatever would be made to him. It is true in the federal courts, as stated in Ziang Sung Wan v. United States, 266 Fed. 1, 14, that "the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact voluntarily made."

There is no claim here of any compulsion applied to defendant. The court left it to the jury as to whether the plea of guilty was voluntary or made under some kind of a promise held out to him by which he was deceived. If the latter it was to be entirely disregarded. Certainly this was all defendant could claim under the facts of this record. McBryde v. United States, 7 Fed. (2d) 466. In the motion made by defendant to set aside the judgment he admits that he had pleaded guilty. The purpose was to reduce the punishment, but if this failed he asked to withdraw his plea, [fol. 481] and that the judgment be set aside. We know of no reason why the plea of guilty was not admissible under all these circumstances for what it might be worth. It was not conclusive of guilt and the court so instructed the jury. The defendant probably knew better than anyone else whether or not he was guilty. Under the evidence in this case a plea of guilty upon his part would have seemed a very reasonable thing. We see no substantial or prejudicial error in the admission of any of the evidence complained of.

Assignments of Error 20 to 43 inclusive, and 46 and 47 relate to the rejection of certain testimony offered by defendant.

Assignments 21, 22, 23 and 32 relate to the refusal of the court to permit witnesses to express opinions and to relate purely hearsay testimony, e. g., whether it was not the opinion of oil men that the trend of the oil lay between certain fields where the Poindexter land was; again, whether in the opinion of the witness the articles of literature in reference to the Poindexter Syndicate overestimated or overrated the value of such land; and again, whether it was not generally reported in oil circles that the "Jimmy" Cox well had come in and was producing oil and gas. Objections thereto were sustained.

Assignment 24 relates to the refusal of the court to permit witness Brown to testify to what J. D. Reynolds told him (which was clearly hearsay). It may be noted that defendant secured the advantage of this conversation, as Brown on cross-examination testified fully thereto.

Assignments 27, 28, 29, 30 and 31 refer to a transaction which occurred more than a year after the indictment was

returned, viz., the transfer of an oil lease in Texas to the "Jack Pot." This transaction was so far removed that it could throw no light on the question of intention at the time the alleged scheme to defraud set forth in the indictment was formulated and carried out, and was inadmissible.

Assignments 34 and 35 relate to the attempt to show certain options of oil leases claimed to have been obtained by one Jack Conway. Assignment 34 is entirely too indefinite to challenge attention. However the transactions of Conway referred to were in July, August and September, 1923, and relate to the effort to organize a new company, and not to the Jack Pot or the Poindexter Royalty Syndicate Companies. Even were the question properly preserved it is [fol. 482] apparent there was no error in the court's ruling excluding the evidence.

Assignments of Error 36 to 43 refer to the offered evidence and rejection thereof with relation to an attempt to formulate a new company to be known as the K. C. Petroleum Company. The purpose of the new formation was to raise money to finance production in the Smackover Oil field. There is controversy in the evidence as to whether the new plan bore any relationship to the "Jack Pot." Defendant strenuously contends that one of its purposes was to raise money to finance the Jack Pot. Defendant did testify that the K. C. Petroleum Company was an organization he was attempting to perfect for the purpose of rasing capital with which to carry on the operations of the Smackover Jack Pot. Again, he testifies that he was not going to raise money to finance the Jack Pot, but that he was raising money to finance production in the Smackover field. The Jack Pot at that time seems to have gone the way of these fly-by-night companies. Its money was completely exhausted. "Finis" had been written on its efforts. Of course, as defendant practically was the Jack Pot there was some relationship between the K. C. Petroleum Company and the Jack Pot. The whole transaction as to the K. C. Petroleum Company seems to have been an attempt entirely upon the part of the defendant to interest men in a new company, which, according to the evidence, met with little response. From an examination of the evidence it is ap-

parent that the new concern actually had nothing to do with the Jack Pot or the Poindexter Royalty Syndicate. There was no error in excluding the evidence of the alleged attempted formation of the new K. C. Petroleum Company. The contract of agreement and the subscription agreement attempted to be introduced in evidence are merely self-serving declarations.

Assignments 55 to 67 relate to the refusal of the court to give certain requested instructions. Some of these are not accurate statements of the law, or combine incorrect with correct statements in such manner that the court would not be warranted in giving them. The other requests applicable to the facts are fully covered by the instructions, and the court having given a correct statement of the law is not required to repeat it, in the words of counsel Ingram v. United States, 5 Fed. (2d) 940.

[fol. 483] We refer to some of the requested instructions. For instance, Assignment 55 is based upon the court's refusal to give Instruction No. 9 which refers to the burden being upon the government to prove the representations made by defendant were false. Assignment 56 refers to Requested Instruction No. 10 which bears on the question of reasonable doubt and the interest and good faith of defendant in making representations. Both of these matters are fully and fairly covered by the instructions of the court. Assignment No. 59 realates to Requested Instruction No. 14, which is as follows:

"If you find from the evidence that the defendant actually believed the representations made by him were true, and that the promises made by him would be fulfilled, however inaccurate or untrue such representations, and however incapable of performance such promises may be found by you to have been in fact, such belief constitutes a complete defense to the charges set forth in the indictment."

It is apparent that this instruction does not correctly state the law. Moore et al. v. United States, 2 Fed. (2d) 839; Slakoff v. United States, 8 Fed. (2d) 9.

Other requested instructions raise the question of conversion by the defendant. Conversion is not an element of

crime under Section 215 of the Penal Code. While there is an allegation of conversion in the indictment it was superfluous. The offense is the improper use of the mails in carrying out the alleged fraudulent scheme. Whitehead et al. v. United States, 245 Fed. 385; Wine v. United States, 260 Fed. 911; Calnay v. United States, 1 Fed. (2d) 926.

There is little to be gained from a reference to each of the requested instructions and the asignment of error based thereon. We have examined the various instructions requested and compared them with the charge given by the court, and are satisfied that where the requested instructions correctly state the law the matter was fully covered by the instructions of the court.

Assignments 19, and 48 to 54 inclusive, cover the court's refusal to direct a verdict upon motion of the defendant at the close of all the evidence. We have carefully read all the evidence offered in this case and are satisfied there was sufficient substantial evidence to prove the scheme as alleged in the indictment; that the representations were false and [fol. 484] known by defendant to be false or made with reckless disregard of the truth, and that the mails of the United States were freely used in carrying out the schemes and devices of defendant.

The vital question in the case is the wrongful intent of defendant. That was for the jury. The theory of the defense seems to be that because the business which defendant was promoting eventually might have been successful and there were opportunities in the oil business for great fortunes defendant was absolved from any false pretenses or fraudulent representations. Such would constitute a new and unsafe standard of business conduct.

In such a lengthy trial, with the volume of evidence offered and introduced, there is, of course, probability of some error. We have examined this record with the care that the importance of the case demands and are satisfied that the evidence was sufficient to sustain the charges in the five counts of the indictment upon which defendant was convicted; that there were no substantial errors in the admission of evidence, the refusal to admit offered testimony, the denial of requested instructions, or in the instructions

given, prejudicial to this defendant. The errors, if any, were of a minor nature.

The judgment of the trial court is affirmed.

Filed May 4, 1926.

[fols. 485-503] In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted]

Judgment—May 4, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Arkansas, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

It is further ordered that the defendant in the Court below, Robert David Kercheval, do surrender himself to the custody of the United States Marshal for the Western District of Arkansas, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

May 4, 1926.

[fols. 504-507] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—July 26, 1926

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Plaintiff in Error.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

[fol. 508] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—Filed November 29, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 509] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed December 20, 1926

Ia is hereby stipulated by and between the undersigned counsel for petitioner and respondent in the above named cause that the following portions of the record shall be omitted from the record as docketed in the Supreme Court of the United States, remaining portions to be printed.

Omit Index.

Omit page A.

Omit Return to Writ, Page B.

Omit Demurrer, Page 20.

Omit last two paragraphs Page 21.

Omit pages 22-24 inclusive.

Omit first paragraph, page 25.

Omit Petition for Writ of Error, Pages 26-27.

Omit Assignments of Error, Nos. 1, 2, 3, 5, to 16 inclusive.

Omit 18-76 inclusive.

Omit pages 44, 45 down last paragraph page 46.

Omit testimony from Page 47 to page 199.

Omit page 199 down to "Mr. Shaver" 5th line from bottom.

Omit testimony page 201 to page 330.

Omit page 330 except 4, 5 and 6th lines.

Omit pages 331 to 388 paragraph beginning "Q. They have read"

Omit last seven lines page 407.

Omit 408 to 440 inclusive.

[fol. 510 & 511] Omit page 449 beginning "Gentlemen of Jury."

Omit pages 450 to 463 "Mr. Shaver."

Omit page 463 "Mr. Jones. Yes Sir," to end of page.

Omit pages 464 to 472 inclusive.

Omit pages 473, 474, 475.

Omit pages 485 to 503 inclusive.

Omit petition for Stay, pages 504 to 507 inclusive.

William E. Leahy, Wm. J. Hughes, Jr., Counsel for Petitioner. William D. Mitchell, Solicitor General.

OK. Wm. D. Whitney, Spec. Asst. to the Atty. Gen.

December 17, 1926.

[fol. 512] [File endorsement omitted]

(4038)